IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

STATE OF NEW YORK, BY ATTORNEY GENERAL ERIC T. SCHNEIDERMAN, Plaintiff, v. INTEL CORPORATION, a Delaware corporation, Defendant.	:	C.A. No. 09-827 (LPS) **PLAINTIFF'S OPPOSITION TO DEFENDANT'S MOTION UNDER RULE 12(c) FOR DISMISSAL WITH RESPECT TO NEW YORK'S DONNELLY ACT DAMAGES CLAIM ON BEHALF OF CONSUMERS** August 3, 2011

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PRELIMINARY STATEMENT

New York's exercise of *parens patriae* authority is firmly grounded in New York state law. New York's highest court, the Court of Appeals, has defined a three-prong test for the Attorney General's invocation of *parens patriae* power. New York courts have affirmed the application of that standard and have allowed treble damages in *parens patriae* actions under the Donnelly Act. The Complaint here satisfies the three-prong test and this action should be permitted to proceed.

Intel confuses the issue by relying on a line of federal cases that were never applicable to state law and which have, in any event, been expressly overruled by statute. On this issue, it is New York law which governs, and this Court should follow the clearly expressed holdings of New York courts.

ARGUMENT

NEW YORK LAW PERMITS TREBLE DAMAGES ACTIONS ON BEHALF OF CONSUMERS UNDER COMMON LAW *PARENS PATRIAE* AUTHORITY

The New York Attorney General is permitted to recover Donnelly Act damages for injury to consumers. *People v. Liberty Mut. Ins. Co.*, 52 A.D.3d 378, 861 N.Y.S.2d 294, 295-296 (N.Y. App. Div. 1st Dep't 2008); *People v. Coventry First LLC*, slip op., C.A. No. 0404620/2006, 2007 WL 2905486 (N.Y. Sup. Ct. Sept. 25, 2007)[1]; *In re Cardizem CD Antitrust Litigation*, 218 F.R.D. 508, 520-21 (E.D. Mich. 2003) (citing *In re Lorazepam & Clorazepate Antitrust Litig.*, 205 F.R.D. 369, 386-87 (E.D. Mich. 2003)).

[1] Copies of unpublished decisions, briefs and congressional materials are annexed to this memorandum of law.

Intel makes several errors in its motion. To begin, Intel ignores the three-prong test set forth by the Court of Appeals in *People v. Grasso,* 11 N.Y.3d 64, 893 N.E.2d 105 (2008). The *Grasso* test is the applicable standard for the attorney general's assertion of common law *parens patriae* authority. As shown in Part A below, New York satisfies all three prongs of the *Grasso* test.

Moreover, as shown in Part B, New York has independent statutory bases for its claim for damages to consumers, in addition to its common law *parens patriae* authority under *Grasso.*

Finally, Intel incorrectly tries to frame the issue as if it were a question of federal law. Intel relies on a now-defunct line of cases, including *California v. Frito-Lay, Inc.*, 474 F.2d 774 (9th Cir. 1973), to argue that federal law prohibits state *parens patriae* claims for damages actions under state antitrust law. As shown in Part C below, this is misguided for two independent reasons: (1) those cases were expressly overruled by statute, and in so doing, Congress specifically noted that State Attorneys General are the best suited to bring such damages claims; and (2) in any event, even before they were overruled by Congress, the *Frito-Lay* line of cases from the Ninth Circuit only applied to *parens claims* under the federal Clayton Act, which is not at issue here.[2]

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[2] New York does not assert consumer claims under federal law. *Accord* Intel Mem. at 1.

A. New York Has Common Law *Parens Patriae* Authority To Seek Damages on Behalf of Consumers Under the Donnelly Act

New York's highest court, the Court of Appeals, has set forth a three-prong test for the Attorney General's assertion of common law *parens patriae* authority: "To invoke the doctrine, the Attorney General must [1] prove a quasi-sovereign interest [2] distinct from that of a particular party and [3] injury to a substantial segment of the state's population." *Grasso,* 11 N.Y.3d at 69 n.4 (bracketed numerals added) (citing *Alfred L. Snapp & Son, Inc. v Puerto Rico ex rel. Barez,* 458 U.S. 592, 607 (1982)); *see also New York v. McLeod,* 2006 NY Slip Op. 50942U, 12 Misc. 3d 1157A, 819 N.Y.S.2d 213 (Table), 2006 WL 1374014 (N.Y. Sup. Feb. 9, 2006). The Attorney General has been found to meet this test where, as here, New York asserts a quasi-sovereign interest in maintaining a competitive marketplace. *See, e.g., New York v. Merkin,* 26 Misc. 3d 1237(A), 907 N.Y.S.2d 439, 2010 WL 936208, *9 (N.Y. Sup. Feb. 8, 2010) ("'New York's vital interest in securing an honest marketplace in which to transact business' was a sufficient basis for *parens patriae* standing."). Here, the Claim in the Complaint which asserts *parens patriae* authority to recover for consumers makes specific allegations about Intel's manipulation of the market, the protection from which is a sovereign interest. *See, e.g.,* Complaint, ¶¶ 260, 263. Even if that interest were insufficient, New York otherwise satisfies all three prongs of the *Grasso* test.

1. <u>New York Has Alleged a "Quasi-Sovereign Interest"</u>

The first *Grasso* prong requires that the Attorney General seek redress for a "quasi-sovereign interest." *Grasso,* 11 N.Y.3d at 69 n.4. Without analysis or support, Intel summarily concludes that the Attorney General's claims are "the prototypical example of a claim brought to vindicate private interests," rather than a "quasi-sovereign interest," and that New York therefore cannot establish the first prong of the *parens patriae* test. Intel. Mem. at 5. "A quasi-sovereign interest is a judicial construct that does not lend itself to simple or exact definition." 81A C.J.S. States § 530 (2011). There are, however, guides to determine whether a claim vindicates a quasi-sovereign interest. "[T]he three factors that normally determine whether a quasi-sovereign interest is sufficiently important to permit standing are (1) the size of the segment of the population that has been adversely affected, (2) the magnitude of the harm inflicted, and (3) the practical ability of those injured to obtain complete relief without intervention by the sovereign." 72 Am. Jur. 2d States, Etc. § 91 (2011). Intel ignores these factors, likely because they favor New York's *parens patriae* standing.

In the modern context, nearly every household has a computer. Thus, the first factor favors New York because virtually the entire population of New York has been affected.

The second factor favors New York because the magnitude of the harm is enormous, in terms of total dollar damage, harm to competition, harm to innovation, and the number of persons affected. Indeed, the magnitude is only confirmed by the large sums Intel has paid in settlements and fines around the globe for essentially the same conduct.[3]

The third factor also favors New York because it would be impractical for those individuals to seek relief without "intervention by the sovereign." 72 Am. Jur. 2d States, Etc. § 91. This is true because of the complexity of proving an antitrust case involving unilateral

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[3] The European Commission, for example, has imposed a penalty of €1 billion. James Kanter, *Europe Fines Intel $1.45 Billion in Antitrust Case,* N.Y. Times, May 13, 2009 (available at http://www.nytimes.com/2009/05/14/business/global/14compete.html).

conduct, as well as the transaction costs (*i.e.*, legal and expert fees) that would drastically outweigh the damage for any individual purchaser. Finally, "complete relief" may require not only damages, disgorgement or restitution, but also – to prevent future injury – injunctive relief and civil penalties. Only the Attorney General is suited to obtain all of those forms of relief, for various reasons, including the fact that the Donnelly Act only permits civil penalty actions by the Attorney General.

2. <u>New York's Quasi-Sovereign Interest Is "Distinct From That of a Particular Party"</u>

The second *Grasso* prong requires that the quasi-sovereign interest be "distinct from that of a particular party." *Grasso,* 11 N.Y.3d at 69 n.4. This prong is satisfied where, as here, "recovery of damages for aggrieved [consumers] is just a part of the AG's case." *Merkin,* 2010 WL 936208 at *9. New York seeks a variety of related relief, including an injunction and civil penalties, as well as damages for its proprietary injury. *See* Complaint, Prayer for Relief. In such circumstances, New York courts have upheld the Attorney General's assertion of Donnelly Act damages claims, rejecting the argument Intel makes here that recovery of such damages is inconsistent with a quasi-sovereign purpose. *Liberty Mut.,* 52 A.D.3d 378, 861 N.Y.S.2d 294; *Coventry First,* 2007 WL 2905486.

3. <u>New York Has Alleged "Injury to a Substantial Segment of the State's Population"</u>

The third prong is satisfied if the Attorney General seeks to recover for "injury to a substantial segment of the state's population." New York seeks to recover damages for *all* New York consumers injured by Intel's conduct, numbering in the millions. *See Merkin,*2010 WL 936208 at *10 ("substantial segment" element satisfied where several thousand investors were victim of the Madoff Ponzi scheme). The "substantial segment of the state's population" requirement must therefore be met where, as here, there has been injury to an enormous swath of the state's population.

4. New York Courts Have Allowed *Parens Patriae* Treble Damages Actions Under the Donnelly Act

New York courts have specifically allowed *parens patriae* treble damages actions under the Donnelly Act. *Liberty Mut.*, 52 A.D.3d 378 (finding quasi-sovereign interest and upholding *parens patriae* claim for Donnelly Act damages arising from bid-rigging scheme); *Coventry First*, 2007 WL 2905486 (upholding Donnelly Act damages claim in bid-rigging case since "[t]he *parens patriae* doctrine enables the State to seek damages, restitution, and civil penalties on behalf of New York residents that are harmed by wrongful acts").

In *Liberty Mutual,* defendants were accused of a bid rigging scheme concerning insurance commissions. *Liberty Mutual,* 52 A.D.3d at 379. The Attorney General sued for, *inter alia*, injunctive relief and damages.[4] Brief for Plaintiff-Respondent, *People v. Liberty Mut. Ins. Co.*, No. 2008-03972, 2008 WL 5934817 at 2 (N.Y. App. Div. 1st Dep't April 2, 2008) (copy attached). The Appellate Division held that "[t]he Attorney General stated valid claims against defendants for their participation in a bid-rigging scheme in violation of the Donnelly Act." *Liberty Mutual,* 52 A.D.3d at 379. The court further found that the rigging of bids for insurance business is a valid basis to assert the Donnelly Act, and that "[t]he State has inherent authority to

[4] As discussed in the next section, Intel is wrong to assert that *Liberty Mutual* was not an action for damages.

act in a *parens patriae* capacity when it suffers an injury to a quasi-sovereign interest." *Id.* Therefore, "the Attorney General [may] sue[] to redress injury to its 'quasi-sovereign interest in securing an honest marketplace for all consumers.'" *Id.* New York has asserted an equally valid quasi-sovereign interest here, and the Attorney Generals' *parens patriae* authority therefore must be upheld.

5. Intel Fails to Distinguish or Refute New York's Authority

Intel cites to a number of cases, which either are inapposite, incorrectly cited or actually support New York's position. For example, Intel argues, incorrectly, that the *Liberty Mutual* Court did not address whether a *parens patriae* claim can be maintained to recover damages. This is wrong. Although it is true that the word "damages" itself does not appear in the ruling, there is no question that it was a damages action, that the Attorney General's *parens patriae* authority to assert damages claims was the issue on appeal, and that it was affirmed without reservation or distinction. Specifically, the publicly available appellate briefs show that the appeal centered on the Attorney General's ability "in his *parens patriae* authority to recover treble damages" under the Donnelly Act. Brief for Plaintiff-Respondent, *People v. Liberty Mut. Ins. Co.*, No. 2008-03972, 2008 WL 5934817 at 9 (N.Y. App. Div. 1st Dep't April 2, 2008). Defendants' challenge to the State's *parens patriae* authority to recover damages under the Donnelly Act failed. *Liberty Mut.*, 52 A.D.3d at 379. In fact, defendants in *Liberty Mutual* did not even challenge New York's *parens patriae* power with respect to injunctive relief or remedies. In other words, the court's affirmation of New York's *parens patriae* power in that context was therefore specifically a confirmation of its right to recover damages under the Donnelly Act. Intel's distinction is therefore unfounded. Indeed, *Liberty Mutual* requires denial of Intel's motion.

Intel also fails to distinguish *Coventry First*, another case finding that the Attorney General of New York may bring *parens patriae* actions for damages under the Donnelly Act. While addressing an unrelated issue, the court clearly states: "The *parens patraie* (sic) doctrine enables the State to seek damages, restitution and civil penalties on behalf of New York residents that are harmed by wrongful acts occurring within and outside this State." *Coventry First*, 2007 WL 2905486.

Intel errs to rely on *New York ex rel. Abrams v. Seneci*, 817 F.2d 1015 (2d Cir. 1987). Aside from the fact that *Seneci* was a federal RICO – not state antitrust – case, *Seneci* is distinguishable because, unlike here, the Attorney General in *Seneci* sought to recover monetary relief under RICO for *only 79 individuals*, not for a larger number of similarly affected persons. In other words, the *Seneci* case arguably failed the *Grasso* prong that requires "injury to a substantial segment of the state's population." *Grasso*, 11 N.Y.3d at 69 n.4. Moreover, the *Seneci* decision can be distinguished on other grounds, including a previous decision in a parallel case granting an injunction against the defendant and awarding restitution to consumers. *Id.* The circumstances could not be more different here, where no court has yet ordered Intel to recompense New York consumers. Intel's reliance on *Philadelphia Hous. Auth. v. Am. Radiator & Standard Sanitary Corp.*, 309 F. Supp. 1057, 1061 (E.D. Pa. 1969), is similarly misguided. *See id.* at 1062 (precluding *parens patriae* authority for "suits for the benefit of particular individuals").

Intel also errs by relying on the intermediate appellate decision *New York v. Grasso*, 54 A.D.3d 180, 198-99 (N.Y. App. Div. 1st Dep't 2008), because in that case restitution was sought on behalf of a *single* entity, a stock exchange. This is not the case here. Moreover, the defendant in *Liberty Mutual* also tried to rely on the intermediate court decisions in *Grasso*, but the *Liberty Mutual* appellate court rejected the argument that its earlier *Grasso* opinion could be read to preclude the attorney General from bringing a *parens patriae* action for treble damages under the Donnelly Act. *Liberty Mut.*, 52 A.D.3d at 379 (expressly rejecting defendants' reliance on *Grasso*).

Intel also cites *Canal Ins. Co. v. Underwriters at Lloyd's London*, 435 F.3d 431, 436 (3d Cir. 2006), apparently for the uncontroversial proposition of how a federal court resolves questions of state law. However, *Canal Insurance* supports New York, not Intel, because New York's highest court *has* affirmed *parens patriae* damages actions and set forth the three-prong *Grasso* test. *Canal Insurance* teaches that the federal courts should look to (1) what that state's highest court "has said in related areas, (2) the decisional law of the state intermediate courts, [and] (3) federal cases interpreting state law." *Id.* As set forth herein, the overwhelming weight of authority by New York's Court of Appeals, the intermediate appellate courts, and the trial courts support New York's assertion of *parens patriae* authority here. *Grasso*, 11 N.Y.3d at 69 n.4; *Liberty Mut.*,52 A.D.3d 378; *Coventry First*, 2007 WL 2905486*; Cardizem*, 218 F.R.D. 508, 520-21.[5]

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[5] *People v. Gold Medal Farms*, 113 Misc. 2d 574, 578 (N.Y. Sup. Ct. 1982), is even farther off point. *Gold Medal Farms* concerned a choice between civil and criminal penalties. This is simply not at issue here and has no bearing on *parens patriae* authority.

Intel relies heavily on an unreported decision in *In re DRAM Antitrust Litig.*, Civ. A. No. 02-1486 PJH, 2007 WL 2517851 (N.D. Cal. Aug. 31, 2007), as well as the decision *People v. Feldman*, 210 F. Supp. 2d 294 (S.D.N.Y. 2002). However, both the *DRAM* and *Feldman* decisions were made before – and therefore did not have the benefit of – the *Grasso, Merkin, Liberty Mut.*, or *Coventry First* decisions, discussed below. The later all expressly affirm the Attorney General's *parens patriae* authority, and set forth the applicable test. It is doubtful that the *Feldman* or *DRAM* decisions would have been decided as they were if they had had the benefit of the more recent state law authority. *See Canal Ins.*, 436 F.3d at 436 (federal courts should follow state courts when ruling on state law). In addition, *Feldman's* passing observation, in a footnote, that the Donnelly Act itself has no *parens patriae* provision, is *dictum* because the Donnelly Act was not at issue in that ruling.[6] *Id.* at 302 n.4.

B. New York Has Statutory Authority to Seek Damages on Behalf of Consumers Under the Donnelly Act

Independent of its common law authority, New York may also bring its Donnelly Act claim on behalf of consumers by virtue of separate statutes. Section 63(1) of the Executive Law authorizes the Attorney General to "[p]rosecute and defend all actions and proceedings in which the State is interested." Section 63(12) authorizes the Attorney General to sue "*in the name of the people of the State of New York*" when any person shall "[e]ngage in repeated fraudulent or

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[6] The *Feldman* court's observation is limited to the non-controversial fact that the Donnelly Act itself does not recite *parens patriae* authority; but New York relies on common law and the Executive Law as authority to recover on behalf of consumers – not a provision in the Donnelly Act itself. Therefore, even if it were not *dictum*, and even if it were not superseded by evolving (continued next page…)

illegal acts or otherwise demonstrate persistent fraud or illegality in the carrying on, conducting, or transaction of business." (emphasis added). Courts have held that New York's Executive Law §§ 63(1) and 63(12) constitute "express state statutory authority [allowing the Attorney General] to represent consumers in a capacity that is the functional equivalent of *parens patriae* authority." *Cardizem*, 218 F.R.D. at 521 (citing *Lorazepam*, 205 F.R.D. at 386-87).

C. Intel Errs to Rely on Federal Law, Which in Any Event Permits New York's *Parens Patriae* Authority

The Supreme Court long ago affirmed state attorney general *parens patriae* actions in general. *Georgia v. Pennsylvania R.R.*, 324 U.S. 439, 451 (1945); *see also Cardizem*, 218 F.R.D. at 520-21 (quoting *Alfred L. Snapp & Son*, 458 U.S. at 607 (1982); citing *Lorazepam*, 205 F.R.D. at 386-87). Intel nevertheless relies on two later cases, *Frito-Lay* and *Hawaii v. Standard Oil*, 405 U.S. 251 (1972), to assert a federal limitation on state attorney general damages actions. Because those cases never applied to state law and, more importantly, they were expressly overruled by statute, Intel is wrong to rely on them.

Almost forty years ago, the Ninth Circuit held that the California Attorney General did not have common law *parens patriae* authority to assert a federal Clayton Act claim. *Frito-Lay, Inc.*, 474 F.2d at 431. This holding had no bearing on a state attorney general's ability to assert a *parens patriae* action under *state* antitrust laws, which itself is determined largely by reference to state, not federal, law. *Illinois v. AU Optronics*, __ F.Supp.2d __, 2011 WL 2214034 (N.D.Ill. 2011) ("*Frito Lay* is not persuasive authority" with respect to state law *parens patriae* actions

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state case law, it would still have no bearing on the issue here.

because "[a]ttorneys general have a sovereign interest in enforcing their own state laws.") (citing *Pennsylvania v. Mid-Atlantic Toyota Distribs.*, 704 F. 2d 125, 131 (4th Cir. 1983)) (West citation not yet available, copy attached). Therefore, it is not applicable on this motion, which targets only the state law Donnelly Act claim.

In any event, the *Frito-Lay* holding was short-lived. Congress recognized that *Frito-Lay* was an error and *expressly* overruled it when it enacted the Hart-Scott-Rodino Antitrust Improvement Act of 1976. 15 U.S.C. § 15c (specifically permitting state attorney general *parens patriae* damages actions under the Clayton Act). The House Report observed that a "State attorney general is an effective and ideal spokesman for the public in antitrust cases, because a primary duty of the State is to protect the health and welfare of its citizens. He is normally an elected and accountable and responsible public officer whose duty is to promote the public interest." P.L. 94-435, Hart-Scott-Rodino Antitrust Improvements Act of 1976, House Report No. 94-499(I), Sept. 22, 1975 at Part III (copy attached). The House Report went on to specifically criticize the *Frito-Lay* decision. *Id.* Indeed, the House Committee found that "the best deterrent to a resumption of the illegal conduct might be a suit by the state which deprives the violator of the profits gained from his bad conduct and provides relief which compensates the injured consumers." *Id.*

Intel glosses over both points. First, Intel ignores the fact that *Frito-Lay* and *Standard Oil* were limited to federal law, and have no bearing on a state Donnelly Act claim. Second, although Intel acknowledges, in a footnote, that *Frito-Lay* was specifically overruled by statute, Intel nevertheless believes that *Frito-Lay* still applies to state law because there was no state legislative equivalent to the Hart-Scott-Rodino amendment overruling those decisions. Intel

Mem. at 7 n.4. This latter point is flawed for two distinct reasons: (1) because *Frito-Lay* applied only to federal Clayton Act claims, not state law claims, a state legislative enactment would be nonsensical; and (2) after *Frito-Lay*, New York's highest court (and lower courts) specifically reaffirmed the Attorney General's right to assert *parens patriae* damage claims under the Donnelly Act, where New York satisfies the three-prong *Grasso* test. *See* Part A above.

Thus, no express amendment of New York's Donnelly Act was necessary to address federal decisions limited to federal law, particularly since those rulings were in any event overruled by Congressional action. The decisions of New York's Court of Appeals and lower courts resolve the issue in New York's favor.

CONCLUSION

For the reasons set forth above, Intel Corporation's Motion Under Rule 12(c) For Dismissal With Respect To New York's Donnelly Act Damages Claim on Behalf of Consumers (Dkt. No. 161) should be denied with prejudice.

Dated: August 3, 2011
New York, New York

Respectfully submitted,
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Compendium of Unpublished Authorities

Supreme Court, New York.
New York County
The People of the State of New York by Eliot SPITZER, Attorney General of The State of New York, Plaintiff,
v.
COVENTRY FIRST LLC, Montgomery Capital, Inc., the Coventry Group, Inc., and Reid S. Buerger, Defendants.
No. 0404620/2006.
September 25, 2007.

West Headnotes
Insurance 217 1994

217 Insurance
217XIII Contracts and Policies
217XIII(S) Transfers of Policies
217k1994 k. Viatical Settlements. Most Cited Cases

For purposes of state's claim against corporate purchaser of life insurance policies for resale, alleging aiding and abetting life settlement brokers in breach of fiduciary duties, brokers of life settlements served as fiduciaries of policy sellers; brokers acted as agents of sellers, with duty of loyalty and obligation to act in sellers' best interests, and were required to disclose any conflicts of interests to sellers.

[This opinion is uncorrected and not selected for official publication.]

Helen E. Freedman, J.S.C.
The following papers, numbered 1 to ___were read on this motion to/for _________

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause - Affidavits - Exhibits ...	_
Answering Affidavits - Exhibits _	_
Replying Affidavits _	_

Cross-Motion: [ ] Yes [ ] No

Upon the foregoing papers, it is ordered that motion sequences 001 and 003 are consolidated for joint disposition and decided in accordance with accompanying memorandum decision.

Dated: 9/25/07

<<signature>>

J.S.C.

The motions with sequence numbers 001 and 003 are consolidated for joint disposition.

Introduction -- This lawsuit concerns the “life settlements” industry, in which owners of variable life insurance policies sell them to third parties for immediate cash. The purchasers then "securitize" the policies by selling them in groups to third-party investors, who pay the premiums as they come due and eventually receive the proceeds of the policies when the insureds die. The Attorney General of the State of New York brought this action on behalf of the people of the State of New York (the "State"or "plaintiff") against defendant Coventry First LLC ("Coventry First"), which purchases life insurance policies from individuals throughout the country for resale to investors. Along with Coventry First, the State sues Coventry First's Executive Vice President, defendant Reid Buerger, Coventry First's parent corporation, defendant Montgomery Capital, Inc. ("Montgomery Capital"), and a Coventry First affiliate, defendant The Coventry Group, Inc. ("Coventry Group").

The complaint alleges that defendants, in concert with brokers acting as intermediaries, uses bid-rigging and other anti-competitive schemes to deprive policy holders of a fair marketplace in which to sell. In addition, the State alleges defendants and the brokers deliberately mislead sellers into believing that buyers are competing freely for their life settlements and that as a result sellers are receiving the best possible prices. Suing as *parens patriae*, the State asserts statutory claims against all defendants for fraudulent business practices under Executive Law § 63(12) (the "Executive Law"), for anti-competitive behavior under General Business Law § 340 *et seq.* (the "Donnelly Act"), and for securities violations under General Business Law § 352 *et seq.* (the "Martin Act"). Plaintiff also asserts common law claims for fraud, unjust enrichment, and inducing the brokers to breach their alleged fiduciary duty to policy sellers. The relief sought by the State includes an order (1) restraining defendants from further misconduct, (2) directing them to disgorge all gains and pay restitution and damages, (3) granting rescission rights to all parties who sold policies to Coventry First from 2001 to the present, and (4) awarding punitive damages, treble damages and plaintiff's costs and attorney's fees.

Claims -- The State alleges the following in the complaint: Coventry First, a Delaware corporation headquartered in Pennsylvania, competes nationwide with other businesses to purchase life settlements through an auction-style bidding process. Sellers often employ the services of one or more brokers who specialize in marketing life settlements; according to the State, these brokers are fiduciaries of the sellers and act their agents to obtain the best prices for them.

The complaint alleges that Coventry First engages in two basic schemes that Buerger oversees and directs. First, they allegedly rig the bidding process by secretly paying brokers to refrain from soliciting bids from Coventry First's competitors and refrain from relaying competing bids to the sellers. Also, until 2005, Coventry First allegedly paid brokers to provide it with the "right of last bid" on life settlements and to refrain from seeking better bids from other buyers.

To illustrate the alleged bid-rigging scheme, the complaint sets out nine transactions in detail. These transactions will be referred to as the "Bid-rigging Examples." As discussed further below, only two of the nine Bid-rigging Examples involved sellers or brokers who reside in New York.

The State alleges a second scheme in which Coventry First motivates brokers to act against the sellers' interests by submitting "gross offers" directly to the brokers. These offers are lump sum payments, from which the brokers draw their compensation before passing the remainder on to the sellers as the life settlement purchase prices. According to the State, although the brokers solicit gross offers, the brokers and Coventry First usually only disclose the net purchase prices to the sellers, and do not reveal the gross offer amounts and the amounts the brokers keep for themselves. This gross payment system allegedly motivates brokers to profit at the sellers' expense, and also encourages them "to advise their clients to sell their life insurance policies when, in fact, such sales may be against the client's financial interests." To further this scheme, plaintiff alleges, Coventry First refuses to disclose a broker's compensation to the seller unless required under state law, and has at times provided sellers with false documents indicating that their brokers received less than their actual compensation. Plaintiff outlines about five additional transactions involving gross offers to demonstrate how Coventry First employs them.

Motions -- In separate motions, Coventry First and Buerger (the "Movants") apply for orders (1) dismissing the complaint for failure to state a claim and (2) compelling the State to arbitrate certain claims and staying this action pending arbitration.[FN1] In [text illegible] motion (# 003), the Movants seek dismissal on the grounds that (1) the State lacks the authority to pursue most if not all of the claims because the alleged wrongdoing and injuries lack a sufficient connection to New York, (2) plaintiff bases its claims on a purported duty to disclose brokers' compensation that does not exist under New York law, (3) plaintiff fails to make out a common law fraud claim because it does not allege that the policy sellers suffered any out-of-pocket injury, (4) none of the parties to the transactions had any fiduciary obligations to the sellers, and (5) and plaintiff fails to state any claim under the Donnelly and Martin Acts or for equitable relief.

FN1. In a separate motion, Montgomery Capital and Coventry Group move for an order dismissing the complaint as against them.

In another motion (# 001), the Movants seek an order compelling the State to arbitrate any claims connected with policy sellers who had executed sales agreements with Coventry First that required the parties to resolve their disputes through arbitration.

Extent of the State's authority -- In seeking dismissal, the Movants first point out that they are not New York residents and that, in the case of seven of the nine Bid-rigging Examples, (1) the policy sellers and brokers reside outside New York and (2) none of the alleged wrongdoing or injuries occurred in New York. The exceptions include one Bid-rigging Example in which both the policy seller and his broker, AllSettled, reside in New York, and another in which AllSettled's misconduct in New York allegedly injured a seller that resides outside New York. The other seven transactions lack any direct connection with New York.

The *parens patraie* doctrine enables the State to seek damages, restitution and civil penalties on behalf of New York residents that are harmed by wrongful acts occurring within and outside this State, *see People v. Concert Connection, Ltd.,* 211 A.D.2d 310, 315-16, 629 N.Y.S.2d 254 (2d Dept.1995), and on behalf of non-residents of the State that have been harmed by wrongful acts in New York, *see People ex rel. Spitzer v. Telehublink Corp.,* 301 A.D.2d 1006, 1009-10, 756 N.Y.S.2d 285 (3d Dept.2003). However, the State's authority under the Executive Law does not extend to redressing injury to out-of-state residents that resulted from wrongdoing outside New York, because the citizens of New York lack any direct interest in the matter. *See* Exec. Law § 63(1) (authorizing the Attorney General to "[p]rosecute ... all actions in which the state is interested.") Likewise, the State's authority to sue under the Martin Act is limited since the statute only regulates securities transactions occurring "within or from" New York. GBL § 352(1); *see also Lehman Bros. Comm. Corp. v. Minmetals Intl. Non-Ferrous Metals Trading Co.,* 179 F.Supp.2d 159, 164 (S.D.N.Y.2001). The Donnelly Act applies to restraints on business "in this state." GBL § 340; *cf. Goshen v. Mut. Life Ins. Co.,* 98 N.Y.2d 314, 326, 746 N.Y.S.2d 858, 774 N.E.2d 1190 (2002) (holding that GBL § 349(h), which also applies to conduct "in this state," precludes recovery for out-of-state injury.) Finally, the State lacks authority to prosecute the common law claims insofar as they are based only upon claims of wrongdoing outside New York by out-of-state residents.

In opposition, plaintiff submits an affidavit stating that 298 of 3,469 life settlement purchases by Coventry First between 2001 and March 2006 involved New York sellers. Plaintiff also asserts in his opposition brief that "many of the [the challenged transactions] were effectuated" through AllSettled, the New York broker. This additional submission further demonstrates that, insofar as New York sellers or brokers or misconduct in New York is involved, the State has stated sufficient grounds to sue on behalf of citizens. However, the claims are partially dismissed insofar as they pertain to life settlement transactions that have no identified connection with New York brokers, New York sellers, or alleged misconduct in New York.

Duty to disclose -- The Movants next contend that all of the State's claims fail because they are "premised entirely" on defendants' breach of a purported obligation to disclose to the sellers the details of the brokers' compensation. However, defendants argue, New York law does not affirmatively require life settlement buyers to disclose what they paid the sellers' brokers as compensation.

Defendants mis-characterize the thrust of the State's allegations. Plaintiff acknowledges that defendants had no statutory duty to disclose the broker payments, but contend that defendants' failure to disclose is merely one element of their alleged pattern of actionable misconduct. That pattern gives rise to plaintiffs' central claims for "fraudulent business practices" under the Executive Law. The thrust of the first alleged scheme is that
Coventry creates the appearance of a legitimate auction for life settlements when, in fact, it pays hidden co-broker payments for purposes of fixing the bids. Nondisclosure of co-broker fees may be part of Coventry's scheme to defraud, but the claim is not for breach of an affirmative duty to disclose.

These allegations state a claim of "fraud" under the Executive Law, which uses the term very broadly "and includes acts which may be characterized as dishonest and misleading." *St. v. Solil Mgt. Corp.,* 128 Misc.2d 767, 772, 491 N.Y.S.2d 243 (Sup. Ct. N.Y. Co.), *aff'd,* 114 A.D.2d 1057, 495 N.Y.S.2d 161 (1st Dept.1985); *see also People v. The Concert Connection, Ltd.,* 211 A.D.2d 310 at 320, 629 N.Y.S.2d 254; *St. v. Feldman,* 210 F.Supp.2d 294, 299-301 (S.D.N.Y.2002) (allegation that defendants rigged bidding at public stamp auctions made out claim under Executive Law). Under the circumstances that the complaint sets forth, defendants' non-disclosure could be deemed as dishonest and misleading practice even if no statute or regulation requires disclosure.

According to the State, non-disclosure also plays a key role in the "gross offer" payment scheme. Since the sellers never learn the how much brokers receive from defendants' gross offers, the State alleges that defendants conceal how the payment scheme benefits defendants and the brokers at sellers' expense.

Donnelly Act -- Defendants argues that the State does not state a claim under the Donnelly Act claim because it fails to adequately allege how defendants' bid-rigging caused "antitrust injury" under the statute by "foreclos[ing] all meaningful opportunities" for policy holders to sell to Coventry First's competitors. However, the State does not need to allege "antitrust injury" in detail to state a Donnelly Act claim, because defendants' alleged scheme to use bid rigging to stifle competition in the life settlement market constitutes a "per se" violation of the Donnelly Act. *See, e.g., People v. Schwartz,* 160 A.D.2d 964, 965, 554 N.Y.S.2d 686 (2d Dept.1990); *Schlottman Agency, Inc. v. Aetna Cas. & Sur. Co.,* 70 A.D.2d 1041, 1041, 417 N.Y.S.2d 561 (4th Dept.1979).

Martin Act -- The Movants correctly point out that the Martin Act claim fails because the variable annuity and life insurance policies that are sold in the life settlement market do not constitute "securities" under the statute. Although variable life insurance policies are considered "securities" under certain federal laws, *see, e.g., S.E. C v. Variable Annuity Life Ins. Co.,* 359 U.S. 65, 71-73, 79 S.Ct. 618, 3 L.Ed.2d 640 (1959)(holding that variable annuities were regulated by the Securities and Exchange Commission), those policies are characterized as insurance products under New York law and comprehensively regulated by the Insurance Law and regulations. *See Meagher v. Metro. Life Ins. Co.,* 119 Misc.2d 615, 618, 463 N.Y.S.2d 727 (Sup. Ct. N.Y. Co. 1983). Accordingly, the Martin Act claim is dismissed.

Common-law fraud claim -- Plaintiff fails to state a fraud claim because the alleged injury to the policy sellers is too speculative. In essence, plaintiff contends that the policy sellers might have received better prices for their policies if the Movants had not rigged the bidding process. However, "[w]ithout proof of an out-of-pocket loss, plaintiff cannot recover in [common law] fraud." *Sardanis v. Sumitomo Corp.,* 279 A.D.2d 225, 229, 718 N.Y.S.2d 66 (1st Dept.2001).

Plaintiff effectively concedes that the "out-of-pocket" rule bars most of the common law fraud claims, but argues for an exception in the case of one transaction in which Coventry First allegedly misrepresented to a seller in writing that a broker had received $ 10,000 less from a gross offer than he actually did. In effect, plaintiff argues that if the seller knew how much the broker was being paid, he might have been able to negotiate a higher price for himself. Again, this claimed loss is too speculative to support any recovery for fraud. It bears emphasis, however, that failure to show out-of-pocket losses has no bearing on whether a claim is stated for fraudulent business practices under the Executive Law, since the term "fraud" is used far more broadly in the statute than in the common law.

Fiduciary claims -- The Movants next contend that the State does not make out a claim for aiding and abetting brokers in breaching their fiduciary duties to sellers, because life settlement brokers owe no fiduciary duty to their clients. Instead, the Movants argue, brokers and sellers have an arms-length business relationship.

The question of whether a life settlement broker is the fiduciary of the selling client is apparently an issue of first impression in this jurisdiction. However, the well-settled principles governing broker-principal relationships lead to the conclusion that life settlement brokers serve as fiduciaries of their clients. Under New York law, a "broker" is, among other things, an agent who for compensation negotiates on behalf of the principal to sell the principal's property while acting as the intermediary between the principal and third-party buyers. *See BAII Banking Corp. v. UPG, Inc.,* 985 F.2d 685, 700 (2d Cir.1993) (construing New York law). In general, agency law governs the rights and obligations between the broker and the principal. *See UWC, Inc. v. Eagle Indus., Inc.,* 213 A.D.2d 1009, 1010, 624 N.Y.S.2d 321 (4th Dept.1995). As the principal's agent, the broker is the principal's fiduciary with a duty of loyalty, and is obliged to act in the principal's best interests. *See Dubbs v. Stribling & Assocs.,* 274 A.D.2d 32, 35, 712 N.Y.S.2d 19 (1st Dept.2000). The broker must remain faithful to the principal in all matters within the scope of the broker's employment. *Id.* Moreover, a broker acting as an agent "is charged with a duty of loyalty and may not have interests in the subject transaction which are adverse to those of his principal." *TPL Assocs. v. Helmsley-Spear, Inc.,* 146 A.D.2d 468, 470, 536 N.Y.S.2d 754 (1st Dept.1989). If conflicts of interest exists, a broker must disclose them to the principal. *See Stevens Residential Sales, LLC, v. Oxford Cap. Corp.,* 306 A.D.2d 112, 112, 759 N.Y.S.2d 876 (1st Dept.2003) (broker's failure to disclose kickback payments constituted breach of fiduciary duty.)

In opposition, the Movants argue that life settlement brokers are merely finders of business opportunities, who as a rule hold no fiduciary duty to their clients. Under the law, the distinction between a broker and a finder is that

The finder is required to introduce and bring the parties together, without an obligation *or power to negotiate the transaction,* in order to earn the finder's fee.... While a broker performs the same introduction task, the broker must ordinarily also bring the parties to an agreement. *N.E. Gen. Corp. v. Wellington Advert., Inc.* 82 N.Y.2d 158, 163, 604 N.Y.S.2d 1, 624 N.E.2d 129 (1993)(emphasis supplied). Here, the State alleges that the brokers do not merely find willing buyers, but "shop the policies", negotiate the transactions, and serve as auctioneers that solicit bids from competing buyers. In short, the brokers serve a central role in life settlement transactions that exceeds that of a business opportunity finder. The brokers' role in life settlements give rise to their fiduciary duties to the sellers, and accordingly the State states a claim that the Movants aided and abetted breaches of those duties.

Unjust enrichment -- The complaint alleges that the Coventry First was unjustly enriched because it purchased life settlements at less than fair-market prices without properly compensating the sellers. The claim for unjust enrichment is dismissed because Coventry First and the sellers entered into written life settlement contracts of sale, and the quasi-contractual claim of unjust enrichment cannot be asserted in a dispute that is governed by an express contract. *See, e.g., MJM Advert., Inc. v. Panasonic Indus., Inc.,* 294 A.D.2d 265, 266, 741 N.Y.S.2d 874 (2d Dept. 2002). In any event, the unjust enrichment claim is redundant, because the State can seek redress for the Movants' allegedly wrongful profit at the sellers' expense in its claim under the Executive Law.

Arbitration -- In the second motion, the Movants contend that the State is compelled to arbitrate its public enforcement action against Coventry First to the extent the State's claims are connected with individual life settlement sellers who entered into contracts with Coventry First that included arbitration agreements. This argument lacks merit, since the State is not a party to any of those arbitrations agreements. Both the Federal Arbitration Act (the "FAA") and New York statue governing arbitration are only enforceable against parties that have agreed to arbitrate. 9 U.S.C. § 2; CPLR § 7503(a). See also *EEOC v. Waffle House, Inc.,* 534 U.S. 279, 293-94, 122 S.Ct. 754, 151 L.Ed.2d 755 (2002) (holding that the FAA does not apply to an enforcement actions brought by a government entity unless it has agreed to arbitrate, even if it seeks victim-specific monetary relief). The Movants cite three cases from other jurisdictions which required state agencies that sought relief on behalf of individuals who had signed arbitration agreements to stand in the individuals' shoes and submit to arbitration. *Olde Discount Corp. v. Tupman,* 1 F.3d 202, 204 (3d Cir.1993); *Ropp v. 1717 Cap. Mgt. Co.,* No. 02-1701, 2004 WL 93945 (D.Del. Jan.14, 2004); *Ralphs Grocery Co. v. Massie,* 116 Cal.App.4th 1031, 11 Cal.Rptr.3d 65 (Cal. Ct. App., 4th Dist., 2004). This Court is unpersuaded by the reasoning of the courts in those cases and declines to follow them. Accordingly, the motion to compel arbitration is denied.

Cross-motion -- Finally, the State cross-moves without opposition for an order substituting Attorney General Andrew Cuomo for former Attorney General Eliot Spitzer in the caption. The cross-motion is granted without opposition.

ORDERED that the causes of action in the complaint are dismissed only insofar as they pertain to life settlement transactions that do not involve New York life settlement brokers, New York policy sellers, or alleged misconduct in New York, and it is further

ORDERED that, except to the extent stated above, the motion to dismiss the first, second, and sixth causes of action is denied, and it is further

ORDERED that the motion to dismiss the third, fourth, and fifth causes of action are granted and those causes of action are severed and dismissed, and it is further

ORDERED that the motion to compel plaintiff to arbitrate and stay this proceeding pending arbitration is denied, and it is further

ORDERED that the cross-motion for an order substituting Andrew M. Cuomo, the Attorney General of the State of New York, as plaintiff in the place of Eliot Spitzer, the former Attorney General, is granted without opposition, and it is further

ORDERED that Andrew M. Cuomo, the Attorney General of the State of New York, is substituted as plaintiff in the place of Eliot Spitzer, the former Attorney General, and it is further

ORDERED, that all papers, pleadings, and proceedings in the above-entitled action are amended by substituting the name of Andrew M. Cuomo as plaintiff in the place of Eliot Spitzer, without prejudice to the prior proceedings in this action, and it is further

ORDERED that plaintiff is directed to serve a copy of this order on the Clerk of the Court and the Trial Support Office (Room 158), who are directed to mark their records accordingly to reflect the substitution and change in the caption of this action, and it is further

ORDERED that the parties are directed to appear before the Court for a preliminary conference on October 16, 2007 at 9:30 a.m. (Courtroom 208, 60 Centre St., NY, NY).

Dated: September 25, 2007

<<signature>>

Helen E. Freedman, J.S.C.

Spitzer v. Coventry First LLC
2007 WL 2905486 (N.Y.Sup.) (Trial Order)

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C
(The decision of the Court is referenced in a table in the New York Supplement.)

Supreme Court, New York County, New York.
The PEOPLE of the State of New York By Andrew M. CUOMO, Attorney General of the State of New York, Plaintiff,
v.
J. Ezra MERKIN and Gabriel Capital Corporation, Defendants.

No. 450879/09.
Feb. 8, 2010.

Sangeap, Daniel, Rosen, Harriet B., Kadosh, Shmuel, for Claimant/Plaintiff/Petitioner The People of the State of New York by Andrew M. Cuomo, Attorney General of the State of New York.

Steiner, Neil A., Mennitt, Gary J. Esq., Levander, Andrew J., for Merkin, J. Ezra and Gabriel Capital Corporation.

Laffey, Casey D., Tulchin, Matthew T. Pitofsky, David B., for Ascot Partners L.P. (Relief Defendants).

Laffey, Casey D., Bensky, Eric A., Schiffman, Howard, for Ascot Fund Limited (Relief Defendants), Gabriel Capital L.P. (Relief Defendants), Ariel Fund Limited (Relief Defendants), Gabriel Assets LLC (Relief Defendants) and Gabriel Alternative Assets LLC (Relief Defendants).

Kaswan, Beth A., New York University, individually and derivatively (non-party).

RICHARD B. LOWE, J.

***1** Defendants J. Ezra Merkin ("Merkin") and Gabriel Capital Corporation ("GCC") move for an order dismissing the complaint pursuant to CPLR 3211(a)(1) and (7).

The Attorney General ("AG") is bringing this action against Merkin and his investment management company, based on violations of the Martin Act, Executive Law § 63(12), the Not–for–Profit Corporation Law and common-law claims. Allegedly, Merkin made misrepresentations and omissions to investors, including many charities, who entrusted him with their money. The AG further alleges that Merkin blindly fed the investors' funds into a Ponzi scheme orchestrated by Bernard L. Madoff ("Madoff") while claiming that Merkin was actively managing those funds. Merkin also allegedly failed to conduct adequate due diligence of Madoff's activities, despite information given to him indicating that Madoff may have been engaged in misconduct. According to the complaint, Merkin's investors lost over $1.2 billion, while he collected more than $470 million in management and incentive fees from his funds including: Ascot Partners L.P., Ascot Fund Limited, Ariel Fund Limited, and Gabriel Capital L.P.

BACKGROUND

Accepting the allegations of the complaint as true (*Leon v. Martinez,* 84 N.Y.2d 83 [1994]), the following facts emerge: Defendant Merkin is the general partner of Ascot Partners, L.P. and Gabriel Capital, L.P. ("Gabriel"), domestic hedge funds. Merkin is the sole shareholder and director of GCC (Complaint, ¶¶ 16–17). GCC serves as the manager of Ascot Fund Limited ("Ascot") and Ariel Fund Limited ("Ariel"), both of which are offshore funds. Merkin collected annual management fees equal to 1% of the capital invested in Ariel, Gabriel, and Ascot. In 2003, Merkin raised the Ascot management fee to 1.5% of the capital invested (*id.,* ¶ 24). He also collected an annual incentive fee of 20% of any appreciation in the assets of Gabriel and Ariel (*id.*).

Merkin and Madoff met in the late 1980s, early 1990s (*id.,* ¶ 26). In the early 1990s, Madoff described to Merkin his investment strategy, known as a "split strike conversion strategy," in which Madofff would buy stocks from the S & P's 100 Index, and simultaneously, buy put options below the current stock price to protect against large decreases, and sell call options above the current price to fund the purchase of the put options (*id.*, ¶ 27). Madoff claimed that he could produce steady returns of 10% per year no matter what the market was doing overall (*id.*).

In 1988, Merkin established Ariel and Gabriel (*id.*, ¶ 66). By 2008, Gabriel had approximately 200 investors with $1.4 billion under management, and Ariel had 78 investors with about $1.3 billion under management (*id.*). From 2001 to 2008, between 20–30% of the assets of Gabriel and Ariel were managed by Madoff (*id.*, ¶¶ 67–79). The remainder of the assets were not managed by Merkin, but by third parties (*id.*). From 1989 to 2007, Merkin collected annual management and incentive fees from Gabriel that totaled approximately $277 million, and from Ariel approximately $242 million (*id.*, ¶ 69).

***2** According to the complaint, in 1992, Merkin created Ascot to serve solely as a feeder fund to Madoff, and substantially all of Ascot's assets were turned over to Madoff (*id.*, ¶ 32). Most of Ascot's investors were not aware that Ascot was a feeder fund for Madoff (*id.*, ¶ 33). Thirty-five non-profit organizations had invested $215 million of the $1.7 billion invested in Ascot by the end of 2008 (*id.*, ¶ 36). From 1995 through 2007, Merkin received management fees of $169 million from the Ascot Fund (*id.*, ¶ 35), and by 2008, Merkin was receiving annual Ascot management fees of approximately $25.5 million (*id.*).

The complaint alleges that after Madoff's arrest in December 2008, Merkin surprised Ariel and Gabriel investors by telling them, for the first time, that the funds had significant Madoff exposure. Thus, the Ariel and Gabriel investors were unaware of the true nature of the investment they were making (*id.*, ¶ 99).

Based on these and other more specific allegations of misrepresentations and omissions by Merkin, the AG has brought six causes of action. The first through third claims are for securities fraud under the Martin Act, General Business Law [GBL] § 352, 352–c (1)(a) and (c), and 353. The fourth claim, alleged only against Merkin, asserts violations of the Not–for–Profit Corporation Law §§ 112, 717, and 720. The fifth claim is for breach of fiduciary duty to the investors of Ascot, Ariel, and Gabriel, and seeks damages and disgorgement of compensation. The sixth claim, asserted under Executive Law § 63(12), maintains that Merkin's and GCC's conduct constituted repeated fraudulent or illegal acts, or constituted persistent fraud in the transaction of business, and seeks restitution and damages.

The AG seeks to enjoin and restrain defendants from the alleged acts and practices, enjoin Merkin from serving as a general or managing partner, director or officer of any investment fund or otherwise managing investments, and enjoin him from serving as a board member, trustee, director or officer of any non-profit organization. The AG also seeks an accounting of all fees and other compensation, and to recover costs and attorneys' fees.

Merkin and GCC now move to dismiss the complaint in its entirety.

DISCUSSION

On a motion to dismiss pursuant to CPLR 3211, the court's task is to determine whether the complaint states a cause of action. The motion will be denied if, within the four corners of the pleading, factual allegations are discerned which taken together manifest a claim cognizable at law (*511 West 232nd Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144, 151–152 [2002]). The complaint will be liberally construed, and the court will accept as true all facts in the complaint and in plaintiff's submissions in opposition to the motion (*id.* at 152). Plaintiff will be accorded the benefit of all possible favorable inferences (*id.*). "Dismissal under CPLR 3211(a)(1) is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law' " (*id.,* quoting *Leon v. Martinez,* 84 N.Y.2d at 88).

Martin Act and Executive Law Claims

***3** The Martin Act (General Business Law Article 23–A) prohibits various deceitful and fraudulent practices in the distribution, sale, exchange, and purchase of securities. Thus, it prohibits the use or employment of "[a]ny fraud, deception, concealment, suppression, false pretense or fictitious or pretended purchase or sale" (General Business Law § 352–c [1][a]). It also prohibits:

> (c) Any representation or statement which is false, where the person who made such representation or statement: (i) knew the truth; or (ii) with reasonable effort could have known the truth; or (iii) made no reasonable effort to ascertain the truth; or (iv) did not have knowledge concerning the representation or statement made;
>
> where engaged in to induce or promote the issuance, distribution, exchange, sale, negotiation or purchase within or from this state of any securities or commodities, as defined in section three hundred fifty-two of this article, regardless of whether issuance, distribution, exchange, sale, negotiation or purchase resulted

(General Business Law § 352–c [1][c]). The Martin Act is remedial in nature and should be liberally construed (*People v. Lexington Sixty–First Assocs.,* 38 N.Y.2d 588, 595 [1976]). The terms "fraud" and "fraudulent practices" are given a broad meaning so that all deceitful practices, even acts "not originating in any actual evil design to perpetrate fraud or injury upon others, which do tend to deceive or mislead the purchasing public" are covered (*id.* at 595). In addition, the AG need not prove intent or reliance in a Martin Act claim (*State of New York v. Sonifer Realty Corp.,* 212 A.D.2d 366, 367 [1st Dept 1995] [fraudulent practices need not constitute fraud in the classic common-law sense, and it is not necessary to show reliance]).

In support of the Martin Act claim, the AG has plead that Merkin concealed and failed to disclose Madoff's role, and misrepresented Merkin's role in the funds' management. For example, the AG alleges that the offering documents, such as the Ascot Memoranda, falsely represented that Merkin was involved in the fund's day-to-day management, and that the success of the fund depended on Merkin's abilities as a money manager. The Memoranda stated, for example, that he exclusively made the capital management decisions using his skill and experience, and that he would devote substantially all his time to managing its assets (Complaint, ¶¶ 39, 42–43). These documents could be construed as misrepresenting that Merkin would be controlling and actively managing the funds, and as concealing that Ascot was a feeder fund to Madoff (*id.,* ¶ 43).

The Ascot Memoranda, starting in 1996, indicated that multiple money managers might be used (*id.,* ¶ 45), which was false and misleading, because allegedly all of the funds were entrusted to a single money manager, Madoff (*id*). The risk factors set forth in the Ascot Memoranda indicated a wide variety of investment strategies, none of which had anything to do with the "split strike conversion" strategy being employed by Madoff with the Ascot funds (*id.,* ¶ 46).

***4** While in the March 2006 Ascot Offering Memorandum, Merkin mentioned Madoff's name, by indicating that Madoff, was one of Ascot's two prime brokers, and that he cleared Ascot's transactions effected through other brokerage firms, this allegedly misrepresented Madoff's role because 98% of Ascot's transactions were both effected and cleared by Madoff, and Madoff had custody of over 99% of Ascot's securities holdings (*id.,* ¶ 47). Therefore, based on these allegations, the AG has adequately pleaded that these misrepresentations constitute fraudulent practices under the Martin Act.

Where the Martin Act claims are based on the defendant's omissions or failure to disclose, the omitted facts must be material—that is, that there is a substantial likelihood that the omitted fact would have assumed actual significance in the deliberations of a reasonable investor (*State of New York v. Rachmani Corp.,* 71 N.Y.2d 718, 726 [1988]). “[T]here must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the total mix' of information made available” ‘ (*id.,* quoting *TSC Industries, Inc. v. Northway, Inc.,* 426 U.S. 438, 449 [1976]; *see also State of New York v. McLeod,* 12 Misc.3d 1157[A] *5, 2006 N.Y. Slip Op 50942[U] [Sup Ct, N.Y. County 2006]).

With respect to Merkin's alleged omissions in failing to reveal Madoff's actual role, and the actual investment strategy being employed, the complaint sufficiently pleads that these omitted facts are material, that is, that there is a substantial likelihood that disclosure of these facts would have been viewed by the reasonable investor as having significantly altered the total mix of information made available (*see id.,* ¶ ¶ 56, 57, 59). Materiality is a mixed question of fact and law. Therefore, it is inappropriate for resolution at the motion to dismiss stage (*see ECA, Local 134 IBEW Joint Pension Trust of Chicago v. JP Morgan Chase Co.,* 553 F3d 187, 197 [2d Cir2009]; *In re NovaGold Resources Inc. Sec. Litig.,* 629 F Supp 2d 272, 292 [SD N.Y.2009]).

With regard to the Ariel and Gabriel Funds, the AG alleges misrepresentations with regard to the types of investments in which the funds would be involved. Thus, for example, the offering documents indicated that these funds focused on distressed debt and merger arbitrage, without disclosing that up to 30% of the funds were turned over to Madoff, who was using a completely different strategy.

In addition, the AG alleges misrepresentations and omissions regarding the ways in which the funds were going to operate. The offering documents indicated that Ariel did not use any self-clearing money managers. However, Madoff self-cleared all his transactions, and had custody of and managed a significant portion of Ariel's assets (*id.,* ¶ 82). Ariel's November 2002 Prospectus stated that brokers for the funds would not perform managerial or policy-making functions for the Fund (*id.,* ¶ 83, and Exhibit 23 annexed thereto). Madoff, however, was performing such managerial functions, and effecting, clearing, and settling transactions, all at the same time (*id.,* ¶¶ 83–84). The March 2006 Offering Memorandum stated that Morgan Stanley was the principal prime broker for Ariel, but this was false and misleading, because Morgan Stanley did not clear Madoff's trades, and was not the custodian for securities managed by Madoff.

***5** The AG also alleges oral misrepresentations by Merkin in which he or his employees denied that Ascot was managed by Madoff, denied that they were doing the same thing as Madoff, or minimized Madoff's role. The complaint also asserts that Merkin also made oral misrepresentations to an investor who was aware that Madoff was involved in Ascot, that Merkin required BDO Seidman, Ascot's auditor, to visit Madoff's offices two or three times a year to perform standard operational due diligence. In fact, however, BDO did not perform such due diligence or any other examination of Madoff's operation (*id.,* ¶ 63). The Ascot Subscription Agreement provided that the investors were given the opportunity to ask questions of, and receive answers from, the General Partner (Merkin and GCC) concerning matters pertaining to the investment. This essentially gives the investors the right to rely upon information the General Partner conveyed to the investor, orally or otherwise (*see Heller v. Goldin Restructuring Fund, L.P.,* 590 F Supp 2d 603, 615 [SD N.Y.2008]). Taken together, all of these alleged oral and written misrepresentations sufficiently state a claim for fraudulent practices under the Martin Act.

The defendants' reliance on a provision in the 2006 Offering Memoranda that Merkin might delegate investment management duties to independent money managers without first providing notice to, or obtaining the consent of, investors, is misplaced. They contend that any alleged misrepresentations were sufficiently balanced by this cautionary language. Defendants appear to be relying upon the "bespeaks caution" doctrine set forth in federal securities cases, which are persuasive authority in determining Martin Act claims (*see e.g. All Seasons Resorts, Inc. v. Abrams,* 68 N.Y.2d 81, 87 [1986] [in applying Martin Act, federal securities law cases are persuasive authority]). Under this doctrine, misrepresentations or omissions "in conjunction with the purchase or sale of securities are considered immaterial where contained in communications or documents including cautionary language sufficiently specific to render reliance on the false or omitted statement unreasonable" ' and not actionable (*United States SEC v. Meltzer,* 440 F Supp 2d 179, 191 [ED N.Y.2006] [citations omitted]; *see Halperin v. eBanker USA.com, Inc.,* 295 F3d 352, 357 [2d Cir2002]). Generalized disclosures regarding unspecified risks, however, will not shield defendants from liability. Instead, regarding the prospective representations, the cautionary language must expressly warn of, and be specific and factual (*Halperin v. eBanker USA.com, Inc.,* 295 F3d at 359). This doctrine is limited to forward-looking statements only, and is not applied to misrepresentations of present or historical facts which cannot be cured by cautionary language (*P. Stolz Family Partnership L.P. v. Daum,* 355 F3d 92, 96–97 [2d Cir2004]). The cautionary language warns investors that "bad things may come to pass-in dealing with the contingent or unforeseen future" (*id.* at 97). It, therefore, does not apply to historical or present fact knowledge, because "[s]uch facts exist and are known; they are not unforeseen or contingent" (*id.*). An offeror may not knowingly misrepresent historical facts and at the same time disclaim the misrepresented facts with cautionary language (*id.; Gabriel Capital, L.P. v. NatWest Fin., Inc.,* 122 F Supp 2d 407, 419 [SD N.Y.2000], *abrogated on other grounds In re IPO Securities Litigation,* 241 F Supp 2d 281, 352 n 85 [SD N.Y.2003] [a defendant cannot use the bespeaks caution doctrine where it knew that its statement was false when made]).

***6** The misrepresentations at the center of this complaint involve Madoff's role as the manager of all of Ascot's funds and a substantial portion of Ariel's and Gabriel's funds. Merkin gave Madoff complete control and investment discretion over all of Ascot's and a substantial portion of Ariel's and Gabriel's funds. Thus, he had already delegated all investment discretion to this money manager, a fact Merkin was presently aware of at the time of the Offering Memoranda. In addition, given that Merkin admitted that he formed Ascot for the purpose of investing with Madoff and that virtually all of its assets were tendered to him, to the extent that the representations that Merkin would exercise discretion in managing the funds, and the performance of the funds depended on his skill and judgment could be construed "as to the future," the misrepresentations were "beyond reasonable expectation" (GBL § 352–c [1] [b]). The reference to Madoff's role as a prime broker, as mentioned above, was misleading because such brokers do not make investment management decisions like Madoff was making, and the mischaracterization of Madoff's role was a historical, present known fact. Further, particularly with regard to Ariel and Gabriel, the misrepresentation regarding their present investment strategy of investing in distressed businesses, also referred to a false historical fact. Defendants have failed to show that no reasonable investor could have been mislead about the nature of the risk when he or she invested (*P. Stolz Family Partnership, L.P. v. Daum,* 355 F3d at 97). This cautionary language also does not address the other misrepresentations and omissions, such as Merkin's failure to exercise judgment in supervising the delegation of investment management to Madoff, his failure to conduct due diligence, and to audit Madoff's activities regarding the funds, and the fact that Merkin ignored the warnings of fraud from his own people and from fund investors. Therefore, the existence of the cautionary language does not negate the materiality of the misrepresentations and omissions alleged in the complaint.

The documentary evidence submitted by defendants, consisting of e-mails from about 10 investors, indicating that these investors were aware that monies were invested with Madoff, fail to demonstrate that dismissal is warranted at this early stage of this action. Whether some of the investors of Ascot, Ariel, and Gabriel were aware that the funds were invested with Madoff, does not bar the AG's claims. The complaint details claims that hundreds of investors were not so aware and therefore the e-mails do not provide a basis for dismissal as a matter of law. Finally, defendants' argument that dismissal is warranted on the ground that the AG cannot show loss causation is also rejected. Loss causation is not an element of a Martin Act claim. A misrepresentation may violate the statute "regardless of whether issuance, distribution, exchange, sale, negotiation or purchase resulted" (GBL § 352–c [1][c]; *State of New York v. Sonifer Realty Corp.,* 212 A.D.2d at 367). Therefore, the first through third causes of action for violations of the Martin Act are sufficient to withstand this motion to dismiss.

***7** The AG's Executive Law claim similarly survives this dismissal motion. Executive Law § 63 (12) gives the AG the power to bring a claim against any person or entity which engages in "repeated fraudulent or illegal acts" or "otherwise demonstrate[s] persistent fraud or illegality in the carrying on ... or transaction of business." Like the Martin Act, the statute broadly construes the definition of fraud "so as to include acts characterized as dishonest or misleading and eliminating the necessity for proof of an intent to defraud" (*People v. Apple Health and Sports Clubs, Ltd.,* 206 A.D.2d 266, 267 [1st Dept], *lv dismissed in part, denied in part* 84 N.Y.2d 1004 [1994]; *see People v. General Elec. Co.,* 302 A.D.2d 314 [1st Dept 2003]). The test for fraud thereunder is whether the acts have the capacity or tendency to deceive, or creates an atmosphere conducive to fraud (*People v. General Elec. Co.,* 302 A.D.2d at 314). Like the Martin Act, since the repeated fraudulent practices targeted by the statute do not need to constitute fraud in the classic common-law sense, reliance need not be shown (*State of New York v. Sonifer Realty Corp.,* 212 A.D.2d at 367). The AG may apply for an injunction, and seek restitution and damages (Executive Law § 63[12]).

As in the Martin Act claims, the allegations here are sufficient to satisfy Executive Law § 63 (12). As determined above with regard to the Martin Act claims, Merkin's representations, as alleged in the pleadings, were fraudulent and his omissions were material. In addition, the AG has alleged that the defendants engaged in "repeated" and/or "persistent" fraudulent acts in violation of Executive Law § 63(12). Again, the AG need not show reliance or loss causation with respect to this claim. Therefore, the defendants' motion with regard to the sixth cause of action is denied.

Not–for–Profit Law Claim

The AG's fourth claim is for violations of the Not–for–Profit Corporation Law §§ 112, 717, and 720. In this claim, the AG alleges that Merkin failed to discharge his duties as an officer or director of "Merkin–Affiliated Non–Profits" with the degree of care, skill, and diligence that an ordinarily prudent person in his position would exercise (Complaint, ¶ 133). These failures included that he received a personal benefit from investments made by "Non–Profit Organizations A, C, and G," failed to disclose that he was actively earning his management fees, failed make diligent inquiries into the risks of investing with Madoff, ignored numerous indications that Madoff was engaging in fraud, and failed to disclose his conflicts of interest (*id.*). The complaint alleges that Merkin was an officer, director, trustee and sat on the investment committees of three non-profits, and collected a personal benefit from the investments made by the two entities referred to as Non–Profit Organizations A and C, on whose board of directors' investment committees he sat, and a third, referred to as Non–Profit Organization G, for which he served as investment advisor (*id.,* ¶ 5, 65, 120–124, 133). It alleges that Merkin was such a regular at the Investment Committee meeting of Non–Profit Organization G that he was "referred to as the Chair in the minutes," and, as this organization's investment advisor, he created a special relationship of trust as its fiduciary (*id.*, ¶ 123). It further asserts that Merkin and Madoff both were on the Board of Trustees of Non–Profit Organization A, which had a large investment in Ascot. The complaint alleges that Merkin breached his fiduciary duty by accepting Non–Profit Organization A's investment in Ascot, where he would earn a significant management fee, when Merkin could have arranged for a direct investment with Madoff without the extra fees (*id.*). The AG further alleges that Merkin breached his fiduciary duties by concealing Madoff's role in Ascot, Ariel, and Gabriel, by failing to disclose conflicts of interest Merkin had in recommending investments, and by making false statements regarding his fee structure. The complaint asserts that Merkin's conduct breached his fiduciary duties in violation of sections 112, 717, and 720 of the Not–for–Profit Corporation Law (N–PCL).

***8** Defendants challenge this claim, asserting that the AG has failed to plead specifically the non-profit corporation of which Merkin was an officer or director. They contend that the complaint only alleges that he was a trustee of Non–Profit Organization A, and that he sat on the investment committees and served as an investment advisor with regard to Non–Profit Organizations C and G.

N–PCL § 112 authorizes various remedial measures that may be pursued in an action or special proceeding brought by the AG under the N–PCL (N–PCL § 112). Section 720 provides that an action may be brought against a director or officer of a not-for-profit corporation to compel the defendant to account for neglect, failure to perform, or other violation of his duties in the management of corporate assets, and the acquisition by himself or transfer to others, loss, or waste of corporate assets due to neglect of, failure to perform, or other violation of his duties (N–PCL § 720). Section 720 (b) specifically provides that the AG may bring an action for the relief provided in the section.

The fiduciary duties of care and loyalty are the legal standards that govern the conduct of not-for-profit directors and officers in their daily relationship with the not-for-profit corporation they serve (N–PCL § 717 [a]). Section 102(a)(6) of the N–PCL defines "director" to mean "any member of the governing board of a corporation, whether designated as director, trustee, manager, governor, or by any other title. The term board' means board of directors' (N–PCL § 102[a][6]).

The complaint, here, adequately pleads that Merkin was a trustee of Non–Profit Organization A, which falls within the definition of director under N–PCL § 102(a)(6). Defendants' submission, at oral argument,[FN1] of the minutes of a meeting of the Board of Trustees for Yeshiva University, which defendants claim is Non–Profit Organization A, at which Merkin attended and spoke as a member of the Board's Investment Committee, supports this conclusion. With regard to the other non-profit organizations designated C and G, this court will not dismiss the claim at this early stage of the litigation. The allegations that Merkin sat on the investment committees of these organizations, and was their investment advisor, even being referred to at one meeting as "Chair," is sufficient at this point.

> FN1. Both parties acknowledge that the documents submitted at oral argument on October 15, 2009 before this court, are subject to a confidentiality stipulation between the parties. Therefore, they will be returned to the defendants. However, the defendants are directed to file redacted copies of these documents for the court file.

Moreover, contrary to defendants' argument, Merkin's alleged breaches of his fiduciary duty, as set forth above, are sufficiently specific. Defendants' contention that the claim of undisclosed conflicts of interest should be dismissed based on documentary evidence they submit, is rejected. While the documents submitted at oral argument indicate that Merkin disclosed to Yeshiva University in March 2001 and March 2002 that he had conflicts with regard to Ascot, indicating the fees he collected, it is not clear whether this disclosure was made to the other non-profit corporations (C and G), and it is not clear if Yeshiva University also invested in Ariel and Gabriel, and whether Merkin's fees and conflicts with regard to Ariel and Gabriel were disclosed to any of the Merkin affiliated non-profit corporations. Therefore, because the defendants' documentary evidence does not clearly refute all of the assertions regarding Merkin's failures under the N–PCL, the court concludes that the motion to dismiss this claim also must fail.

Breach of Fiduciary Duty Claim

***9** The breach of fiduciary duty claim also survives defendants' motion. In this claim, the AG alleges that Merkin utterly failed to manage, supervise, or monitor the investments of Ascot, Ariel, and Gabriel, as he was obligated to as their investment manager. By turning over the funds to Madoff without conducting adequate due diligence, despite information given to Merkin by his own associates, as well as some of the funds' investors, indicating that Madoff may have been engaged in misconduct (*see* Complaint, ¶¶ 107–115), Merkin breached his fiduciary duties to the funds and the investors. The complaint also alleges that while Merkin was aware of certain aspects of Madoff's operations that raised the possibility of fraud by Madoff, including Madoff's use of paper trade confirmations, the secrecy of Madoff's operations, the fact that Madoff was self-clearing, and that his operations were controlled exclusively by himself and close family members (*id.,* ¶ 116), Merkin never questioned Madoff's operations.

Defendants challenge this claim on several grounds. First, they claim that the AG does not have parens patriae standing. Parens patriae is a common-law doctrine regarding standing. It allows the state to bring an action to prevent harm to its sovereign interests, such as the health, safety, comfort, and welfare of its citizens. To invoke the doctrine, the AG must show: (1) a quasi-sovereign interest in the public's well-being; (2) distinct from that of a particular private party; and (3) injury to a sufficiently substantial segment of the population (*see Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez,* 458 U.S. 592, 607 [1982]; *see also People v. Grasso,* 11 NY3d 64, 69, n 4 [2008]). A “quasi-sovereign interest' has been held to consist of a set of interests which the state has in the well-being of its populace” (*State of New York v. McLeod,* 12 Misc.3d 1157[A], *10, 2006 N.Y. Slip Op 50942[U]). Courts have held that “a state has a quasi-sovereign interest in protecting the integrity of the marketplace” (*People v. Grasso,* 11 NY3d at 69 n 4, citing *State of New York v. General Motors Corp.,* 547 F Supp 703 [SD N.Y.1982]; *People v. H & R Block, Inc.,* 16 Misc.3d 1124[A], 2007 N.Y. Slip Op 51562 [U] [Sup Ct, N.Y. County 2007] [Moskowitz, J.], *affd* 58 AD3d 415, 417 [1st Dept 2009]).

Here, the recovery of damages for aggrieved investors is just a part of the AG's case. The AG's focus is on obtaining injunctive relief designed to “vindicate the State's quasi-sovereign interest in securing an honest marketplace for all consumers” (*People v. H & R Block, Inc.,* 16 Misc.3d 1124 [A],* 7, 2007 N.Y. Slip Op 51562[U]). Specifically, the AG has identified a strong quasi-sovereign interest in ensuring that the “financial markets as a whole, and the hedge fund industry in particular, operate honestly and transparently” (AG's Memorandum of Law, at 23; *see People v. H & R Block, Inc.,* 58 AD3d at 417 [“New York's vital interest in securing an honest marketplace in which to transact business” was a sufficient basis for parens patriae standing]; *People v. Liberty Mut. Ins. Co.,* 52 AD3d 378, 379 [1st Dept 2008]; *see also People v. Coventry First LLC,* 2007 WL 2905486 [Sup Ct, N.Y. County 2007], *affd as mod* 52 AD3d 345, 346 [1st Dept 2008], *affd* 13 NY3d 108 [2009] [upholding parens patriae standing to secure honest marketplace for claims including breach of fiduciary duty]). The fact that the AG is seeking recovery on behalf of an identifiable group of investors, here, does not require this court to ignore the purpose of this breach of fiduciary duty claim, and to characterize it, as defendants do, as one brought solely to benefit a few private investors (*see People v. H & R Block, Inc.*, 16 Misc.3d 1124[A], * 7, 2007 N.Y. Slip Op 51562[U]; *see also State of New York v. General Motors Corp.*, 547 F Supp at 706–707).

***10** With respect to injury to a substantial segment of the population, Merkin's alleged misconduct touched many investors, many of whom are New York State residents. They were not just individuals, but also funds and financial institutions representing individuals, charities, and foundations. This is sufficient to show injury to a substantial segment of the population (*see People v. Liberty Mut. Holding Co.*, 2007 WL 900997 [Sup Ct, N.Y. County 2007], *affd as mod* 52 AD3d 378 [1st Dept 2008]). Defendants' contention that the AG must show an inability of the allegedly injured individuals to obtain relief in a private suit, is without merit. Case law does not demonstrate such a requirement (*see Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez,* 458 U.S. 592, *supra*). The fact that some private investors may choose to pursue or not to pursue claims on their own behalf does not detract from the substantial public interest at stake in this action. In addition, it is unclear whether all of the investors can obtain individual relief. Therefore, the AG has shown a sufficient basis for parens patriae standing with regard to the breach of fiduciary duty claim.

The defendants also contend that the Martin Act preempts this claim. They fail, however, to cite cases in support of this argument and this court has found no precedent holding that the Martin Act preempts the AG from bringing a common-law claim. The Martin Act cases to which defendants do cite involve claims brought by private parties, in which, under certain circumstances, the courts find that to allow such a claim would circumvent the bar to private actions under the Martin Act (*see Horn v. 440 East 57th Co.,* 151 A.D.2d 112, 120 [1st Dept 1989]; *In re Bayou Hedge Fund Litig.,* 534 F Supp 2d 405 [SD N.Y.2007], *affd* 573 F3d 98 [2d Cir2009]; *Kassover v. UBS AG,* 619 F Supp 2d 28 [SD N.Y.2008] [AG has exclusive jurisdiction to enforce the Martin Act]; *but see Caboara v. Babylon Cove Dev., LLC,* 54 AD3d 79 [2d Dept 2008] [individual's common-law fraud claim, resting on same facts as Martin Act, not preempted, so long as satisfies pleading standards]; *Scalp & Blade, Inc. v. Advest, Inc.,* 281 A.D.2d 882, 883 [4th Dept 2001] [breach of fiduciary duty claim not preempted by Martin Act). The Martin Act preemption doctrine is to preserve the AG's exclusive jurisdiction to enforce the statute, and to permit the claim here does not undermine that exclusive enforcement jurisdiction. In fact, the AG has pursued Martin Act claims along with common-law claims, including claims for breach of fiduciary duty (*see e.g. People v. Coventry First LLC,* 13 NY3d 108, *supra* [Martin Act claims and breach of fiduciary duty and fraud claims permitted to proceed together]; *compare People v. H & R Block, Inc.*, 158 AD3d 415, *supra* [Executive Law § 63(12) claims pursued with breach of fiduciary duty and fraud claims]).

Defendants' reliance on *People v. Grasso* (11 NY3d at 70) to urge that the principles that govern private parties regarding preemption based on the Martin Act, must be applied to the AG's claim here, is misplaced. The *Grasso* case was brought by the AG under the N–PCL. The AG asserted nonstatutory claims against Richard Grasso, as an officer or director of a non-profit corporation, the NYSE, based on specific provisions of the N–PCL. The Court determined that the Legislature's comprehensive enforcement scheme in the N–PCL required a finding of fault—that the officer or director lacked good faith in executing his duties. It found that the nonstatutory claims asserted in that action, based on specific N–PCL statute provisions, were devoid of any fault-based elements. Thus, the nonstatutory claims had a lower burden of proof than that specified by the statute, overriding the Legislature's fault-based scheme. As such, the Court found that they were fundamentally inconsistent with the N–PCL, and reached beyond the bounds of the AG's authority. In the instant case, the breach of fiduciary duty claim is not based specifically on any Martin Act provisions, or, for that matter, on any provisions in the N–PCL. Moreover, the Martin Act, like the breach of fiduciary duty claim, does not require deceitful intent (*see Horn v. 440 East 57th Co.,* 151 A.D.2d at 120). Therefore, there is no inconsistency between the statutory Martin Act claims, and the breach of fiduciary duty claim.Finally, the fifth cause of action sufficiently states a claim for breach of fiduciary duty. To state a claim for breach of fiduciary duty, a plaintiff must plead: (1) the existence of a fiduciary duty between the parties; (2) a breach of that duty; and (3) damages resulting from the breach (*see People v. H & R Block, Inc.,* 16 Misc.3d 1124[A], * 7, 2007 N.Y. Slip Op 51562[U]). The AG has adequately pled this claim against Merkin by asserting that, as the General Partner of Ascot Partners and Gabriel Capital, L.P., the two domestic funds, he had fiduciary duties to his investors. In fact, in his testimony to the AG, Merkin admitted that he had "fiduciary responsibilities for oversight of the portfolios" (Complaint, ¶ 24 and Exhibit 1 annexed thereto, at 101). With regard to the offshore funds, Ariel and Ascot Fund Limited, investment advisors, such as Merkin, owe fiduciary duties to their clients, particularly where the investment advisor has broad discretion to manage the client's investments (*see EBC I, Inc. v. Goldman Sachs & Co.,* 5 NY3d 11, 19–20 [2005] [underwriter as expert advisor with regard to market conditions held to owe fiduciary duty]; *Brooks v. Key Trust Co. Natl. Assn.,* 26 AD3d 628 [3d Dept 2006], *lv dismissed* 6 NY3d 891 [2006] [financial advisor with discretionary authority to act owes a fiduciary duty]; *Rasmussen v. A.C.T. Environmental Services Inc.,* 292 A.D.2d 710, 712 [3d Dept 2002] [investment advisor owes fiduciary duty]; *Bullmore v. Banc of Amer. Securities LLC,* 485 F Supp 2d 464, 470–471 [SD N.Y.2007]; *Fraternity Fund Ltd. v. Beacon Hill Asset Management LLC,* 376 F Supp 2d 385, 413–414 & n 182 [SD N.Y.2005] [collecting cases]). Individuals in positions of trust, such as "investment advisors, are subject to liability for breach of fiduciary duty when they deceive or defraud their clients" (*Bullmore v. Banc of Am. Securities LLC,* 485 F Supp 2d at 471). Merkin was the investment advisor and manager to the investors of all four of the funds, and he had complete discretion with regard to how the monies were invested. The relationship created by the Offering Documents imposed on Merkin a duty to act with care and loyalty independent of the terms of those agreements.

***11** Defendants urge that this claim should be dismissed because it may not be asserted individually by shareholders of a Cayman Islands corporation. *Fraternity Fund Ltd. v. Beacon Hill Asset Management LLC* (376 F Supp 2d 385, *supra*) is instructive. In that case, individual investors in hedge funds sued the limited liability companies issuing the funds and their principals, alleging, among other claims, that the defendants had breached their fiduciary duties to the investors. The court rejected the defendants' argument that the wrong belonged only to the corporation. It found that the wrong was a fraud committed on the shareholders rather than on the funds, in that defendants had fraudulently overstated the net asset value of the funds, concealing the declines in the fund assets, and the investors were injured when they invested or retained their investments in reliance upon the misstatements (*id.* at 409). Here, the wrongs alleged include Merkin's misrepresentations and omissions regarding what the investors were investing in, and what his role would be in managing the funds, his affirmative misrepresentations to investors after he had already delegated all authority and discretion to Madoff, and his failure to perform due diligence and ignoring signs of fraud. These alleged wrongs were a fraud committed on the shareholder investors rather than on the funds, and the investors were injured when they invested or retained their investments in reliance upon the misstatements.

Defendants' argument that there was no breach because the documents permitted Merkin to delegate his duties to other money managers without notice, lacks merit. The breach of fiduciary duty is not that he was permitted to and did delegate to other money managers. The breach alleged is based on Merkin's misrepresentations regarding his role in purportedly managing the funds and in conducting due diligence with regard to the investments, and in his concealment, both before and after the delegation of all or a portion of the funds to Madoff, that the funds were with Madoff. To the extent that the Offering Documents and Partnership Agreements with regard to Gabriel and Ascot Partners provide that Merkin's liability is limited to “bad faith, gross negligence, recklessness, fraud, or intentional misconduct” the breach of fiduciary duty claim for those investors may be so limited.

Injunctive Relief

Finally, defendants fail to demonstrate a basis to strike the AG's request for injunctive relief. It is entirely premature to determine whether the AG will be entitled to an injunction, and the extent of any such injunction under the Martin Act, the Executive Law § 63(12), or the Not–for–Profit Law. The exact nature of injunctive relief that may be awarded will await further determination of the claims.

CONCLUSION

The court has considered the remainder of defendants' arguments and finds them to be without merit.

Accordingly, the motion to dismiss is denied in its entirety.

N.Y.Sup.,2010.
People ex rel. Cuomo v. Merkin
26 Misc.3d 1237(A), 907 N.Y.S.2d 439, 2010 WL 936208 (N.Y.Sup.), Blue Sky L. Rep. P 74,821, 2010 N.Y. Slip Op. 50430(U)

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For Opinion See 861 N.Y.S.2d 294

Supreme Court, Appellate Division, First Department, New York.
THE PEOPLE OF THE STATE OF NEW YORK by Andrew M. Cuomo, Attorney General of the State of New York, Plaintiff-Respondent,
v.
LIBERTY MUTUAL INSURANCE COMPANY, Liberty Mutual Fire Insurance Company, First Liberty Insurance Corporation, Liberty Insurance Corporation, Liberty Marine Underwriters, Inc., Employers Insurance Company of Wausau, Wausau Business Insurance Company, Wausau General Insurance Company, and Wausau Underwriters Insurance Company, Defendants-Appellants.
No. 2008-03972.
April 2, 2008.

Brief for Respondent

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PRELIMINARY STATEMENT

The Attorney General brings this proceeding under Executive Law § 63(12); the Donnelly Act, General Business Law ("GBL") §§ 340-347; Insurance Law § 2316; and New York common law to combat a range of fraudulent and anticompetitive business practices engaged in by defendants Liberty Mutual Insurance Company and affiliated entities (collectively "Liberty Mutual" or "Liberty"). The amended complaint in this proceeding alleges that Liberty Mutual (1) induced insurance brokers and independent insurance agents to steer clients to its products when that was not in clients' best interests and (2) participated in a bid rigging scheme designed to create the appearance of a competitive bidding process for business when none actually existed. In a decision dated March 27, 2007, Supreme Court, New York County (Fried, J.) denied Liberty Mutual's motion to dismiss the amended complaint (*see* Record ["R."] 9-25). Liberty Mutual appealed. For the reasons stated below, Supreme Court's order should be affirmed in all respects.

QUESTIONS PRESENTED

1. Did the Attorney General state valid statutory and common-law claims against Liberty Mutual for fraudulent and anticompetitive conduct based on its participation in a bid-rigging scheme?

Supreme Court answered in the affirmative.

2. Did the Attorney General state valid statutory and common-law claims against Liberty Mutual for inducing brokers to steer business to it by using contingent commissions? Supreme Court answered in the affirmative.

STATEMENT OF THE CASE

A. The Attorney General's Complaint

The amended complaint seeks injunctive and monetary relief based on claims for fraudulent and illegal business practices under Executive Law § 63(12), anticompetitive conduct in violation of the Donnelly Act and Insurance Law § 2316, common-law fraud, inducing a breach of fiduciary duty, and unjust enrichment. As described more fully below, the amended complaint alleges that Liberty Mutual: (1) induced insurance brokers and independent insurance agents (collectively, "producers") to steer clients to its products when that was not in clients' best interests and (2) participated in a bid-rigging scheme designed to create the appearance of a competitive bidding process for business, when in fact the results of the process had been predetermined by the participants in the scheme to further their own financial interests.

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1. Steering Based on Contingent Commissions

The amended complaint alleges a course of conduct by Liberty Mutual that was intended to induce, and did induce, producers to steer their clients to Liberty Mutual policies where those policies did not best serve clients' interests (R. 149-150). Producers offer insurance products from an array of insurers and hold themselves out to the insurance-buying public as a source of unbiased advice about the coverage options available (R. 135). Liberty Mutual induced producers to steer business by entering into special contingent commission arrangements that created improper incentives for producers to direct business its way despite their duties of loyalty to their clients.

Contingent commissions take a number of forms, but in broad terms they are annual commissions an insurer pays to a producer if it meets certain targets relating to one or more of (1) the volume of business the producer places with the insurer, (2) the number of clients that renew policies with the insurer, and (3) the profitability of the business placed with the insurer. Contingent commissions are generally distinguished from fixed or upfront commissions, which are paid as each policy is written, usually based on a flat rate. While contingent commissions are paid by the insurer to the producer, fixed commissions are usually deducted by the producer from a check provided by the client before the premium amount is forwarded to the insurer. (R. 139)

In communications with one producer, Liberty Mutual acknowledged that it entered into these special contingent commission arrangements to create “incentive[s] ... to encourage [the producer] to place an increased amount of profitable business with [Liberty Mutual]” (R. 140). Internal communications from the producers themselves show that the special arrangements achieved their purpose, and induced producers to steer clients, in New York and elsewhere to Liberty Mutual policies even where such policies were more expensive than or inferior to competitors' products (R. 141).

For example, in an e-mail sent near the end of 2003, an executive of producer Arthur J. Gallagher & Co. (“Gallagher”) urged employees “to pump” business to insurers with “more lucrative incentive programs,” specifically including a Liberty Mutual subsidiary (R. 140). Similarly, 2003 communications at another producer, Willis Group Holding Ltd. (“Willis”), describe a strategy “to maximize” its contingent commission receipts by “[m]aximiz[ing] premium volume flow to key carriers with the most attractive contingent income agreements” (R. 141). E-mails exhorted Willis personnel not to “forget the advantages of placing as much business as possible with the carriers [it had] negotiated special deals with” (R. 141). Other e-mails expressly identified Liberty Mutual as having negotiated such “special agreements,” even describing Liberty as one of the “biggest contingency players” (R. 141).

2. Steering Based on Reinsurance Tying

Liberty Mutual also induced one producer, Aon Corporation, to steer business to it through another means - namely, a side agreement related to Liberty's own reinsurance business (R. 142).[FN1] In short, Liberty agreed to place its reinsurance business through Aon in exchange for Aon's commitment to steer property insurance customers to Liberty Mutual policies (R. 142).

FN1. Reinsurance refers to insurance purchased by an insurer itself to cover a portion of the risk from the policies the insurer writes.

Under the agreement, Aon reduced its brokerage fees so that Liberty Mutual would continue to use it as the broker for its reinsurance business. The parties' agreement gave Aon the opportunity to recapture those forgone fees, however, based on the volume and profitability of property insurance business it placed with Liberty Mutual nationwide. The terms of this agreement were secret and were not disclosed to Aon clients who purchased Liberty Mutual property insurance (R. 142).

3. Bid-Rigging

The amended complaint also asserts claims based on Liberty Mutual's participation from 2001 through 2004 in a bid-rigging scheme coordinated by brokers at Marsh & McLennan Companies, Inc. ("Marsh") in the area of excess casualty insurance (R. 143-149).[FN2]

FN2. Excess casualty insurance covers losses above the policy limits of policyholders' primary casualty and property policies. It is often sold in "layers." For example, if a client's primary policy with Insurer A provides coverage up to $10 million, Insurer B might provide the first layer of excess insurance from $10 million to $25 million, and Insurer C might cover the next layer from $25 million to $50 million (R. 143).

Under the bid-rigging scheme, Marsh would handpick an insurer to prevail in a rigged "bidding process" for excess insurance business, provided that the chosen insurer's bid met certain targets set by Marsh. The chosen insurer was usually the incumbent that had previously insured the layer of business in question. Once the prevailing insurer was selected, other insurers participating in the scheme would submit less attractive bids - known as "fake," "backup," "supportive," "protective," or "B" quotes. Marsh would present the rigged bids to the client to give it the false impression that a competitive bidding process had occurred, and that the chosen insurer's bid was the best available. The effect of this scheme was to direct business to insurers on terms favorable to the insurers and to Marsh, not on the best terms for the client. (R. 144-145)

Liberty Mutual participated in both sides of the bid-rigging scheme. Thus, when Liberty was the incumbent on a particular piece of business, Marsh would typically protect Liberty's incumbency. In other cases, Liberty agreed to provide losing bids or to decline to provide a quote in order to protect the incumbent insurer, often with the understanding that Liberty itself would be protected from competition on other business (R. 143-144). The complaint details four specific instances in which Liberty intentionally provided losing bids at the behest of Marsh (R. 146-148).

In 2005, a Liberty Mutual employee pleaded guilty to criminal charges in connection with the bid-rigging scheme, admitting that he had submitted "protect[ive] quotes ... intended to allow Marsh to maintain control of the market and protect the incumbent" (R. 145). The employee further acknowledged that Liberty "benefit[t]ed from the scheme" because "Marsh often allowed Liberty either to renew its place on [an] excess layer or to gain new business" in exchange for Liberty's cooperation (R. 145).

B. Proceedings Below

The Attorney General commenced this proceeding on May 5, 2006. Three weeks later, the Attorney General filed an amended complaint (*see* R. 133-151). On July 31, 2006, Liberty Mutual moved to dismiss the amended complaint (R. 128-129). Supreme Court heard oral argument on the motion on December 21, 2006 (see R. 26-120).

In a decision dated March 27, 2007, Supreme Court (Fried, J.) denied Liberty Mutual's motion to dismiss (see R. 9-25).[FN3] First, the motion court sustained the Attorney General's claims under Executive Law § 63(12). It held that those claims were timely and were pleaded with sufficient particularity, observing that the amended complaint "sets forth in adequate detail the components of the alleged fraudulent conduct so as to inform Liberty Mutual of the substance of the claim against it" (R. 17). The court also rejected Liberty Mutual's argument that the § 63(12) claims had to be dismissed because contingent commissions are not illegal, noting that "even if contingent compensation arrangements are lawful, the amended complaint also alleges bid rigging" (R. 17). The court sustained the Attorney General's common-law fraud claims for similar reasons (*see* R. 19-20).

FN3. One defendant, Liberty Mutual Holding Company, Inc., filed a motion to dismiss for lack of personal jurisdiction, which Supreme Court granted (R. 24-25). The Attorney General has not appealed that ruling, and it is not at issue in this appeal.

The motion court also denied dismissal of the Attorney General's claims for inducing a breach of fiduciary duty. The court held that the cases cited by Liberty Mutual did not support "the proposition ... that an insurance agent does not act in derogation of the duties owed to the insured by taking part in a bid rigging scheme" (R. 21). The court further held that the Attorney General's complaint sufficiently pleaded that Liberty Mutual acted knowingly in inducing producers' breaches, given "the settled principle that on a motion to dismiss the court must accord plaintiff the benefit of every possible favorable inference and determine only whether the facts as alleged fit within any cognizable legal theory" (R. 21).

Supreme Court further ruled that the amended complaint pleaded sufficient facts to support the Attorney General's standing to assert his antitrust and common-law claims as parens patriae. The court observed that the alleged bid-rigging scheme was "likely to broadly affect a substantial segment of the population in the area of insurance," particularly since the alleged conduct "raised premiums for all customers who purchased excess casualty insurance throughout the United States from 2001 through 2004" (R. 23).

The motion court additionally held that the Attorney General's Donnelly Act claims were not preempted by article 23 of the Insurance Law (R. 18-19). The court ruled that several of the antitrust claims brought under Insurance Law § 2316 were untimely under the three-year statute of limitations, but that one claim involving conduct in September 2003 was timely filed (R. 19).

As to the Attorney General's claims for unjust enrichment, the motion court rejected Liberty Mutual's argument that those claims were barred because all premium payments received by Liberty Mutual were made pursuant to express contracts of insurance. The court observed that "[t]he scope, enforceability, and applicability of [those] agreements cannot be determined on these papers" (R. 20). Finally, the court rejected Liberty Mutual's objections to punitive damages (R. 22).

Liberty Mutual thereafter filed a motion to renew and reargue. In a decision and order dated October 16, 2007, Supreme Court granted that motion in part and denied it in part (R. 121-122). The motion court agreed with Liberty Mutual that the sole surviving claim under Insurance Law § 2316 should be dismissed as time-barred, in light of a recent stipulation executed between the Attorney General and Liberty Mutual that corrected a typographical error in the amended complaint and identified the actual date of certain bid-rigging conduct as September 2002, rather than September 2003, as the complaint mistakenly alleged (R. 121; *see* R. 123). The court granted the Attorney General's request for permission to amend the complaint to address the limitations problem (R. 122).

The motion court rejected Liberty Mutual's argument in the motion to renew and reargue that the Attorney General's Donnelly Act damages claims should be dismissed based on this Court's intervening decision in *People v. Grasso,* 42 A.D.3d 126 (1st Dep't 2007) (R. 122).

Liberty Mutual appeals from Supreme Court's March 27, 2007 decision denying its motion to dismiss.[FN4]

FN4. Pursuant to stipulation, proceedings in Supreme Court are stayed pending the resolution of criminal trials concerning related acts involving certain employees of Marsh (R. 125-126), in which the first two defendants have been convicted of felonies under the Donnelly Act.

***11** ARGUMENT

POINT I

THE ATTORNEY GENERAL STATED VALID CLAIMS AGAINST LIBERTY MUTUAL FOR BID-RIGGING

A. Liberty Mutual's Participation in Bid-Rigging Violated the Donnelly Act.

1. The Attorney General Has Parens Patriae Standing to Assert Claims for Damages under the Donnelly Act.

Under the Donnelly Act, "every contract, agreement, arrangement, or combination" that restrains, among other things, "competition or the free exercise" of business activity is "declared against public policy, illegal and void." General Business Law § 340(1). The Attorney General here alleges that Liberty Mutual engaged in bid-rigging - a clear Donnelly Act violation. Based on this violation, the Attorney General has sued in his parens patriae authority to recover treble damages pursuant to GBL § 340(5), which authorizes suit by "[t]he state, or any political subdivision or public authority of the state, or any person who shall sustain damages by reason of any violation of" § 340.

Under settled law, a State has inherent authority to act in a parens patriae capacity when it suffers an injury to a quasi-sovereign "interest apart from the interests of particular private parties." *Alfred L. Snapp & Sons, Inc. v. Puerto Rico,* 458 U.S. 592, 601, 607 (1982); *see also* ***12***Finger Lakes Health Sys. Agency v. St. Joseph's Hosp.,* 81 A.D.2d 403, 407 (3d Dep't 1981) (discussing the State's "inherent" parents patriae authority). Here, the Attorney General sues to redress injury to its "quasi-sovereign interest in securing an honest marketplace for all consumers," free of bid-rigging. *State v. Gen. Motors Corp.,* 547 F. Supp. 703, 706-07 (S.D.N.Y. 1982). Courts have long recognized that such antitrust violations implicate quasi-sovereign interests. *See, e.g., Georgia v. Penn. R.R. Co.,* 324 U.S. 439, 450-51 (1945); *In re Ins. Antitrust Litig.,* 938 F.2d 919, 927 (9th Cir. 1991), *rev'd in part on other grounds sub nom. Hartford Fire Ins. Co. v. Cal.,* 509 U.S. 764 (1993).

Although § 340(5) may not expressly authorize the Attorney General to sue for damages in his parens patriae capacity, it hardly follows, as Liberty Mutual contends (Liberty Mutual Br. at 24-31), that § 340(5) thereby negates the Attorney General's inherent parens patriae authority. As this Court recently held, under traditional parens patriae doctrine, "a state has standing to bring a cause of action that otherwise properly can be brought only by private parties" where the requisite quasi-sovereign interest is shown. *People v. Grasso,* 42 A.D.3d 126, 141 (1st Dep't 2007).

Liberty Mutual argues that *Grasso* requires dismissal of the Donnelly Act damages claims here, but its reliance on that decision is misplaced. In *Grasso,* this Court found that the Attorney General was seeking to bring claims that were inconsistent with, ***13** and thus foreclosed by, the statutory scheme in question. The Attorney General contests that finding of inconsistency,[FN5] but agrees that if there were such inconsistency, the statutory scheme might evince an intent to exclude the Attorney General's exercise of common-law powers. But no such inconsistency is even arguably present here.

FN5. This Court granted the Attorney General permission to appeal to the New York Court of Appeals in *Grasso* on October 23, 2007. The case is fully briefed and awaiting argument before the Court of Appeals.

In *Grasso,* the Attorney General sued a former officer of a non-profit corporation alleging that he had received excessive compensation. The Attorney General sued under Not-For-Profit Corporation Law ("N-PCL") § 720(a)(2), which authorizes the Attorney General, the non-profit corporation itself, or an officer or director of the corporation to set aside any unlawful payment by the corporation where the recipient knew of its unlawfulness; the gravamen of the claim was that the defendant knew that his compensation was unreasonable, in violation of N-PCL §§ 202(a) (2) and 515(b), which prohibit the payment of unreasonable compensation to officers and directors of a non-profit. The Attorney General also asserted, pursuant to his parens patriae authority, common-law claims for unjust enrichment and payment had and received.

To prevail on those claims, the Attorney General would have to show ***14** that the defendant's compensation was excessive, but would not have to show that the defendant knew of its unlawfulness.

This Court held that to permit the Attorney General to sue as parens patriae for excessive compensation without satisfying the mens rea element set forth in § 720(a) (2) would be contrary to the statutory design: “What is of decisive importance is that the ... non-statutory causes of action are plainly inconsistent with core provisions of the legislative scheme.” *Grasso,* 42 A.D.3d at 139. In this Court's view, recognizing the non-statutory claims in question would allow the Attorney General to “circumvent the substantive standards for the liability of directors and officers established by the Legislature,” and would contravene the Legislature's determination that “a fault-based requirement should be essential” to directors and officers' liability for excessive compensation. *Id.* at 140, 141. This Court further noted that the parens patriae authority does not empower the Attorney General “to modify the substantive elements” of a statutory cause of action. *Id.* at 142.

The *Grasso* analysis is inapplicable here. The Attorney General is not attempting to alter the substantive elements of a Donnelly Act damages claim, as this Court found to be the case in *Grasso.* Rather, the Attorney General is seeking through his parens patriae authority to prove the very same Donnelly Act violation ***15** hat any other litigant would have to prove - no more and no less - in order to vindicate the State's quasi-sovereign interests.

Contrary to Liberty Mutual's suggestion, *Grasso* does not stand for the proposition that the Attorney General generally lacks the power to assert causes of action not expressly authorized by statute. In fact, this Court disclaimed any such ruling even in the context of the N-PCL, stating that “[w]hether the Attorney General has any authority to bring causes of action ... other than the causes of action the Legislature expressly authorized the Attorney General to bring is an issue we need not and should not resolve.” *Id.* at 136.

The dispositive factor in *Grasso* was the perceived presence of a conflict between the statute and the Attorney General's proposed non-statutory parens patriae action. There is no such conflict here. The best Liberty Mutual can muster (Liberty Mutual Br. at 26-27) is its suggestion that allowing the Attorney General's damages claims in this case would conflict with the prohibition on recovery of Donnelly Act treble damages in a private class action. *See* C.P.L.R. 901(b) (prohibiting recovery of penalties in a class action); *Sperry v. Crompton Corp.,* 8 N.Y.3d 204, 209 (2007) (holding that a private class action for treble damages is barred as an action seeking penalties within the meaning of C.P.L.R. 901(b)).

***16** But a parens patriae suit by the Attorney General simply is not a class action, and C.P.L.R. 901(b) does not purport to apply to a suit like this one. The Attorney General's parens patriae authority is rooted in common-law decisions recognizing the State's inherent authority to bring such actions. *See, e.g., Snapp,* 458 U.S. at 601, 607; *Late Corp. of Church of Jesus Christ v. United States,* 136 U.S. 1, 57 (1890); *Finger Lakes Health Systems,* 81 A.D.2d at 407. By contrast, the class action device is a creature of statutory law, *see* C.P.L.R. art. 9, which prescribes several prerequisites to the maintenance of a damages class, in addition to C.P.L.R. 901 (b), that do not apply in a parens patriae suit - *e.g.,* numerosity, predominance, typicality, adequacy of representation, and superiority, *see* C.P.L.R. 901(a). Moreover, parens patriae suits are brought by public officials accountable to the electorate, not by private parties represented by private class counsel.

Liberty Mutual cites no authority for the novel proposition that the Attorney General may not invoke the State's inherent parens patriae authority unless expressly bestowed by statute. Nor is there any basis for concluding from the Legislature's express grant of authority to the Attorney General in certain Donnelly Act provisions that the Legislature must have made a deliberate choice to withhold parens patriae authority under GBL § 340(5). The two sets of provisions are not comparable. The express references to ***17** the Attorney General's powers in the Donnelly Act all come in provisions that either (1) vest exclusive enforcement authority in that office, *see* GBL §§ 342 (authorizing the Attorney General alone to sue to restrain Donnelly Act violations), 342-a (authorizing the Attorney General alone to sue for civil penalties), 343 (affording the Attorney General alone investigatory powers); or (2) grant the Attorney General additional authority not held under state law generally, *see* GBL §§ 342-b (authorizing the Attorney General to bring damages suits on behalf of political subdivisions or public authorities), 347 (granting the Attorney General primary authority over criminal antitrust prosecutions).

The express grant of these special enforcement powers to the Attorney General in the Donnelly Act should create no expectation that the Legislature would have expressly referenced the Attorney General's traditional parens patriae authority if it had meant for such authority to be retained. It makes more sense to presume that the Legislature wished not to disturb the Attorney General's traditional authority, given the absence of any explicit statement negating it. And if anything, the Attorney General's express and unique enforcement role under the Donnelly Act only strengthens the case for recognizing his customary parens patriae authority in this context. *See also* GBL § 340(5) (requiring the Attorney General to be notified at or before the commencement of any Donnelly Act damages suit).

***18** 2. The Donnelly Act's Statute of Limitations Does Not Bar the Attorney General's Claims.

The limitations period for Donnelly Act claims seeking civil penalties is three years.[FN6] GBL § 342-a. Because the amended complaint alleges Liberty Mutual's participating in bid-rigging through 2004 (R. 143, 148), which is within three years of this suit's filing on May 5, 2006, the claims at issue are timely.

FN6. Liberty Mutual does not contend that the damages claims under the Donnelly Act are time-barred. The limitations period for such claims is four years under GBL § 340(5).

Liberty Mutual seems to argue that the limitations issue must be determined based only on the specific instances of bid-rigging discussed in the complaint, of which the latest is April 2003, rather than the broader course of conduct alleged in the complaint. Even if that were true, however, the Attorney General's claims would be timely based on tolling of the limitations period due to Liberty Mutual's fraudulent concealment of its wrongdoing.

The Court of Appeals has held that "the Donnelly Act. should generally be construed in light of Federal [antitrust] precedent." *Anheuser-Busch, Inc. v. Abrams,* 71 N.Y.2d 327, 335 (1988). In federal antitrust cases, courts toll the running of limitations where fraudulent concealment has occurred - that is, where a defendant either "took affirmative steps to prevent the [plaintiff's] discovery of [its] claim," or "the wrong itself was of such a nature as to be self-concealing." ***19***N.Y. v. Hendrickson Bros.,* 840 F.2d 1065, 1083 (2d Cir. 1988). Where fraudulent concealment applies, the limitations period is tolled until the plaintiff may fairly be charged with notice of a claim, at which point limitations begins to run. *Id.* at 1083. The same doctrine should apply under the Donnelly Act.

Bid-rigging is illicit activity that is inherently self-concealing. As the Second Circuit observed in *Hendrickson*, "[t]he passing off of a sham article as one that is genuine is an inherently self-concealing fraud, whether what is passed off is a fake vase sold as a real antique, or a collusive bid purporting to reflect genuine competition." 840 F.2d at 1083-84 (citations omitted). As the allegations of the amended complaint reflect, "a bid-rigging conspiracy is the kind of enterprise that requires a number of participants and, in order that there be adequate incentive for their participation, agreement as to a number of contracts." *Id.* at 1084. Accordingly, "the enterprise is designed to endure over a period of time," and in order to do so, "must remain concealed from the victim of the collusive bids." Id.

In this case, the Attorney General did not discover Liberty Mutual's participation in Marsh's bid-rigging scheme until an Attorney General investigation uncovered it in October 2004. Therefore, the Donnelly Act claims, filed in May 2006, are timely under the three-year limitations period.

***20** To be sure, this Court suggested in *State v. Daicel,* 42 A.D.3d 301 (1st Dep't 2007), that fraudulent concealment applies to a claim under Executive Law § 63(12) or GBL § 349 only when a plaintiff alleges that such concealment continued after the end of a conspiracy that is the subject of the plaintiff's claims. *See* 42 A.D.3d at 303. However, analysis under Executive Law § 63(12) and GBL § 349 does not look to federal antitrust precedent like analysis under the Donnelly Act does. As noted above, federal law in the antitrust context does not require additional allegations of concealment beyond the principal wrong alleged when that wrong is inherently self-concealing. Notably, in *Daicel* itself, this Court did not dismiss the Donnelly Act cause of action on limitations grounds, even ordering that a portion of the claim be addressed on the merits by the trial court after remand. *Id.* Finally, if this Court were to find the Donnelly Act claims at issue to be time-barred, the Court should afford the Attorney General an opportunity to replead, as Supreme Court did with respect to the Insurance Law claims it found untimely (R. 122).

3. The Attorney General's Donnelly Act Claims Involve Conduct That Is Not Regulated by Article 23 of the Insurance Law.

General Business Law § 340(2) provides in relevant part that "the provisions of [the Donnelly Act] shall apply to licensed insurers, ... licensed insurance brokers, ..and other persons ***21** and organizations subject to the provisions of the insurance law, to the extent not regulated by provisions of article twenty-three of the insurance law."

Liberty Mutual argues that its alleged participation in bid-rigging is "regulated by provisions of article twenty-three of the insurance law," and therefore not subject to the Donnelly Act, because Insurance Law § 2316(a) (1) through (4) prohibit general anticompetitive behavior by insurers. Liberty Mutual Br. at 32-34. However, Insurance Law § 2316 was not in force and effect between August 3, 2001 and June 25, 2003, *see* Insurance Law § 2342, when a substantial portion of Liberty Mutual's alleged bid-rigging activity occurred (see R. 143, 148 [alleging that Liberty Mutual engaged in bid-rigging between 2001 and 20041). At least as to conduct occurring between August 3, 2001 and June 25, 2003, it is clear that Liberty Mutual's participation in bid-rigging was not "regulated by article 23 of the Insurance Law," even under Liberty Mutual's interpretation of that language.

Moreover, Liberty Mutual's interpretation of the GBL § 340(2) exception is incorrect, and, even as to periods during which Insurance Law § 2316 was in effect, Liberty Mutual's bid-rigging conduct alleged was not "regulated by" article 23 within the meaning of GBL § 340(2). Under that subsection, an insurer's conduct is "regulated by" article 23 of the Insurance Law only to the extent that the conduct is subject to the regulatory regime for ***22** rate-making administered by the Superintendent of Insurance, as set forth in that article, under which insurers are permitted to fix rates cooperatively in certain circumstances. *See, e.g.,* Insurance Law § 2313 (regulating the activities of "rate service organizations"); *id.* § 2313(o) (authorizing cooperation in rate making among rate service organizations or such organizations and insurers). The prohibition on general anticompetitive conduct in Insurance Law § 2316(a) (1) through (4) is not "regulation" of insurer's conduct within the meaning of GBL § 340(2). *Cf. Cal. v. Cabazon Band of Missions Indians,* 480 U.S. 202, 209 (1987) (distinguishing between "prohibitory" laws that generally "prohibit certain conduct" and "regulatory" laws that "generally permit the conduct at issue, subject to regulation").

The legislative history of GBL § 340(2) confirms this reading, demonstrating that the exception to Donnelly Act coverage was meant to extend only to rate-making activities subject to regulation by the Superintendent. For instance, the report of the Joint Committee on Insurance Rates and Regulation observed that "[r]egulated concerted activities such as those permitted by [article 23] of the Insurance Law are excluded from the application of the Donnelly Act for the reason that those matters are adequately regulated by the Superintendent of Insurance." Joint ***23** Comm. on Ins. Rates & Regu-

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lation (Condensed Report), *reprinted in* 1948 *N.Y.S. Legislative Annual* 239, 245.[FN7]

FN7. The report also noted that New York "ha[d] developed a regulatory pattern covering rates and rating organizations, [article 23] of the Insurance Law, [which] ... provides that in those fields of insurance in which it applies ... , insurance companies may fix their rates either individually or in concert through rating bureaus." *Id.*, *reprinted in* 1948 *N.Y.S. Legislative Annual* at 247.

Similarly, an Insurance Department memorandum supporting the bill noted that GBL § 340(2) "would exempt the insurance business to the extent that it is regulated by the provisions of [article 23] of the Insurance Law for the reason that such article confers legal sanction to the carrying on of concerted activities on the parts of insurers with respect to rate making and regulates such activities." Memorandum of Raymond Harris, Dep. Superintendent and Counsel, N.Y. State Ins. Dep't (Mar. 19, 1948), at 1, *reprinted in* Bill Jacket for ch. 502 (1948), at 5. The Insurance Department memorandum also "emphasized ... that while insurers are permitted, under [article 23] of the Insurance Law, but subject to regulation, to act in concert in the making of insurance rates, there are other concerted activities and inter-company arrangements. which are not subject to regulation under the law." Id. at 2, *reprinted in* Bill Jacket for ch. 502, at 6.

The sole case Liberty Mutual cites for its argument, *Burnham Service Corp. v. National Council on Compensation Insurance, Inc.*, N.Y.L.J., July 30, 1999, at 23, col. 2 (Sup. Ct. N.Y. County Aug. ***24** 5, 1999), *aff'd*, 288 A.D.2d 31 (1st Dep't 2001), only reinforces the Attorney General's position. That case involved alleged anticompetitive conduct by insurers in charging worker's compensation rates that were not in conformity with rate schedules previously submitted to the Superintendent of Insurance. Supreme Court held no Donnelly Act claims premised on that conduct could lie, because "[a]rticle 23 of the Insurance Law sets forth a regulatory structure for filing workers' compensation rates," and therefore "the conduct complained of ... f[ell] within the scope of the regulatory activities found in Article 23." By contrast, article 23 does not create a regulatory structure for insurers' participation in competitive bidding processes, and accordingly, the bid-rigging conduct alleged here is not "regulated by" article 23 within the meaning of GBL § 340(2).

Finally, Liberty Mutual's interpretation of GBL § 340(2) and Insurance Law § 2316 would make a dead letter out of GBL § 340(2)'s statement that the Donnelly Act generally applies to insurers. Under Liberty Mutual's reading, any conduct that violates the Donnelly Act will also necessarily violate Insurance Law § 2316, and as a result would be subject to the exception to Donnelly Act coverage set forth in GBL § 340(2). This would mean that the Donnelly Act would never apply to insurers, even though the plain language of GBL § 340(2) states that it applies in at least some ***25** instances. For all of these reasons, the Attorney General's Donnelly Act claims are not precluded by Insurance Law § 2316.

B. Liberty Mutual Aided and Abetted a Breach of Fiduciary Duty by Participating in Bid-Rigging.

To plead a claim for aiding and abetting a breach of fiduciary duty, a plaintiff must allege that: (1) a fiduciary breached its obligations to another; (2) the defendant knowingly induced or participated in the breach; and (3) the plaintiff suffered damage as a result of the breach. *Kaufman v. Cohen*, 307 A.D.2d 113, 125 (1st Dep't 2003). The amended complaint alleges that (1) producers breached their duties of loyalty and due care to clients by laboring under conflicts of interest and by steering clients to particular insurance policies, including Liberty Mutual policies, when it was not in the clients' best interests; (2) Liberty Mutual knowingly induced or participated in these breaches by participating in Marsh's bid-rigging scheme; and (3) as a result of producers' steering, clients purchased insurance policies that were more expensive than or otherwise inferior to available substitutes.

Liberty Mutual's principal argument against the fiduciary-duty claims based on the bid-rigging allegations is that insurance brokers owe no fiduciary duties to their clients. *See* Liberty Mutual Br. at 42-46. It is settled law, however, that insurance brokers are agents of the insured. *See* Insurance Law § 2101(c); *Bohlinger v. Zanger*, 306 N.Y. 228, 231 (1954);

26Ribacoff v. Chubb Group of Ins. Cos.*, 2 A.D.3d 153, 154 (1st Dep't 2003); 2540 *Assocs. v. Assicurazioni Generali, S.P.A.*, 271 A.D.2d 282, 284 (1st Dep't 2000); *Evvtex Co. v. Hartley Cooper Assocs. Ltd.*, 102 F.3d 1327, 1331-32 (2d Cir. 1996).

It is likewise well established that an agent owes a fiduciary ??y of loyalty to its principal. Indeed, “fundamental to the principal-agent relationship is the proposition that an [agent] is to be loyal to his [principal] and ... is at all times bound to exercise the utmost good faith and loyalty in the performance of his duties.” *Sokoloff v. Harriman Estates Dev. Corp.*, 96 N.Y.2d 409, 416 (2001) (quotation marks omitted and alteration in original). An agent, as a fiduciary, “must act in accordance with the highest and truest principles of morality” and must not seek to acquire indirect advantages from third persons for performing duties and obligations owed to [the agent's] principal.” *Id.* (quotation marks omitted and alteration in original).[FN8] This ***27** fiduciary duty of loyalty “is a sensitive and ‘inflexible’ rule of fidelity, barring not only blatant self-dealing, but also requiring avoidance of situations in which a fiduciary's personal interest possibly conflicts with the interest of those owed a fiduciary duty.” *Birnbaum v. Birnbaum*, 73 N.Y.2d 461, 466 (1989).

FN8. While insurance brokers are agents of the insured and offer an array of insurance products, “insurance agents” typically offer products from a single insurer and act as agents of that insurer. *See* Insurance Law § 2101 (a). A third category of intermediary is the “independent insurance agent,” *see id.* § 2101(b), which the complaint includes with brokers in the broader class of “producers.” There is little authority on the legal status of independent insurance agents in New York. In most critical respects, however, independent agents function the same way that brokers do. Independent agents, like brokers, sell products from many different insurers, not a single insurer, and market themselves to prospective clients as a source of “valuable advocacy” regarding “a broad choice of products.” Independent Insurance Agents and Broker of America, *Trusted Choice: You Need an Independent Insurance Agent, available at* http://www.iiaa.org/TC/Consumer/default.htm (last visited March 29, 2008). Given these core similarities, independent insurance agents should be held subject to the same duty of loyalty to their clients as are brokers.

In arguing that there is no fiduciary duty of loyalty owed here, Liberty Mutual cites inapposite decisions from this Court dismissing fiduciary-duty claims against *insurers*, which did not address brokers in any way. Liberty Mutual Br. at 43 (citing *Gaidon v. Guardian Life Ins. Co.*, 255 A.D.2d 101 (1st Dep't 1998); *Goshen v. Mutual Life Ins. Co.*, 259 A.D.2d 360 (1st Dep't 1999)). Liberty Mutual also cites several cases from other courts that dismiss claims against insurance brokers for breach of fiduciary duty. Liberty Mutual Br. at 43-45. But none of those cases contradicts the core legal principles relevant here: that an insurance broker is an agent of the insured and, as such, owes a duty of loyalty to the insured, just as any agent bears such a duty to its principal.

To be sure, the courts have recognized various limitations on a broker's duties to its clients. As all agents' duties are ***28** bounded by “the scope of the agency,” *AJ Contracting Co. v. Trident Managers*, 234 A.D.2d 195, 196 (1st Dep't 1996), the duties owed by an insurance broker are “ordinarily defined by the nature of the request” a client makes to its broker, *Madhvani v. Sheehan*, 234 A.D.2d 652, 654 (2d Dep't 1996) (quotation marks omitted). Thus, while a broker “has a duty of reasonable care to the customer to obtain ... requested coverage within a reasonable time after the request,” *id.* (quotation marks omitted), the broker has “no continuing duty to advise, guide or direct a client to obtain additional coverage” after the initial request is satisfied, *Murphy v. Kuhn*, 90 N.Y.2d 266, 270 (1997).

Furthermore, this Court has held that a broker's duties do not require disclosure of its “contractual commitments,” *Wender v. Gilbert Agency, Inc.*, 304 A.D.2d 311, 311 (1st Dep't 2003), including “the existence of a contingent commission agreement,” *Hersch v. DeWitt Stern Group, Inc.*, 43 A.D.3d 644, 645 (1st Dep't 2007). Nor is a broker obliged to ensure that a client understands the contents of an insurance policy, since an insured who receives a policy is “conclusively presumed to have known, understood and assented to its terms." *Busker on the Roof Ltd. P'ship v. Warrington,* 283 A.D.2d 376, 377 (1st Dep't 2001).

But these holdings do not speak to the Attorney General's claims here, which rest upon a far more basic duty: the duty of loyalty that prohibits an agent from laboring under a conflict of ***29** interest, and from placing its own financial interests above its principal's best interests. That is the duty Marsh breached through its bid-rigging scheme, which created the appearance that clients were benefitting from a competitive bidding process when Marsh in fact had rigged the bids to serve its own ends, and those of participating insurers. By taking part in the bid-rigging scheme, Liberty Mutual plainly aided and abetted Marsh's breach of fiduciary duty. (See R. 11-17)

C. The Claims Have Been Pleaded with Sufficient Particularity.

The amended complaint pleads the Attorney General's Executive Law § 63(12) and common-law fraud claims based on bid-rigging with sufficient particularity to satisfy C.P.L.R. 3016(b). That statute merely requires that a pleading set forth "the nature of the alleged fraud ... in sufficient detail to inform the defendants of the substance of the claims." *Marcus v. Jewish Nat'l Fund, Inc.,* 158 A.D.2d 101, 106 (1st Dep't 1990) (quotation marks omitted); *see also Bd. of Managers of 411 E. 53rd St. Condominium v. Dylan Carpet, Inc.,* 182 A.D.2d 551, 552 (1st Dep't 1992). Moreover, this Court has cautioned that C.P.L.R. 3106(b) should "not to be interpreted so strictly as to prevent an otherwise valid cause of action in situations where it may be 'impossible to state in detail the circumstances constituting the fraud' " without further discovery. *Bd. of Managers,* 182 A.D.2d at 552 (quoting ***30** *Jered Contracting Corp. v. N.Y. City Transit Auth.,* 22 N.Y.2d 187, 194 (1968)); *accord Fed. Ins. Co. v. Specialty Paper Box Co.,* 222 A.D.2d 254 (1st Dep't 1995). Furthermore, even if the complaint were deficient in some respect, the Attorney General should be given an opportunity to amend its complaint to provide further details. *See Lanzi v. Brooks,* 43 N.Y.2d 947 (1978) (granting such leave to amend); *see also* 5 Weinstein, Korn & Miller, *New York Civil Practice:* CPLR ¶ 3016.07 (observing that leave to amend should generally be given when a complaint is dismissed under C.P.L.R. 3016(b)).

Liberty Mutual argues that the amended complaint fails to plead that clients relied on the fake bids that Liberty Mutual submitted in deciding where to place their business. Liberty Mutual Br. at 53. That argument has no relevance to the Attorney General's § 63(12) claims, because reliance is not an element of such a claim. *See State v. Sonifer Realty Corp.,* 212 A.D.2d 366, 367 (1st Dep't 1995). As to the common-law fraud claims, the amended complaint adequately pleads reliance. The complaint pleads that (1) the intentionally losing bids submitted by participants in the scheme, including Liberty Mutual, were presented to clients (R. 144), and (2) the chosen insurer handpicked by Marsh to submit the most attractive bid actually received the business in question (R. 144, 146-147). When he pleaded guilty, moreover, Liberty Mutual's employee Kevin Bott admitted that his conduct in submitting ***31** intentionally losing bids "had the effect of allowing Marsh to obtain property in the form of millions of dollars in commissions and fees from each of numerous policyholders and insurance companies" (R. 145). These allegations suffice to plead reliance, particularly since the very point of rigging a bidding process is to induce the customer to pick a particular bidder by ensuring that its bid is the most attractive.

Liberty Mutual also argues that the amended complaint is deficient for failing to identify specific instances in which Liberty itself obtained business through a rigged bidding process. Liberty Mutual Br. at 54. But for the purpose of the Attorney General's fraud claims, it does not matter whether Liberty Mutual ever did so. It is enough that Liberty participated in the scheme to defraud by providing intentionally losing bids designed to allow other insurers to prevail in bidding processes. And in any event, the complaint contains sufficient allegations to put Liberty Mutual on notice of the substance of the Attorney General's claim as to its receipt of business through rigged bidding. Particularly given Liberty Mutual's superior access to information on the point, it is unreasonable to demand identification of specific instances at this stage in the proceeding. *See Jered,* 22 N.Y.2d at 194.

There is also no merit to Liberty Mutual's passing objection (Liberty Mutual Br. at 47) to the particularity with which the fiduciary-duty claims based on bid-rigging are pleaded. Liberty ***32** Mutual argues that the complaint "fails to identify a single insured that received, much lees relied on, any alleged protective quote." Liberty Mutual Br. at 47. But C.P.L.R. 3016(b) merely requires "that the misconduct complained of be set forth in sufficient detail to clearly inform a defendant with respect to the incidents complained of." *Lanzi v. Brooks,* 43 N.Y.2d 778, 780 (1977) (quotation marks omitted); *accord Kaufman,* 307 A.D.2d at 120 (claim adequately pleaded where complaint "inform[s] defendants of the substance of the claims" (internal quotation marks omitted)). The bid-rigging allegations in the complaint easily satisfy that test, and certainly should not be dismissed for lack of further details that will be obtained through depositions and similar discovery.

D. The Complaint States a Claim for Unjust Enrichment.

The amended complaint alleges that Liberty Mutual was unjustly enriched by its inducement of steering and its participation in bid-rigging because that conduct caused Liberty Mutual to receive more money in premiums than it otherwise would have. This is sufficient to state a claim for relief. *See Cox v. Microsoft Corp.,* 8 A.D.3d 39, 40 (1st Dep't 2004) (allegations that a defendant's "deceptive practices caused [individuals] to pay artificially inflated prices for its products state a cause of action for unjust enrichment").

***33** Liberty Mutual argues that the unjust enrichment claim should have been dismissed because "New York law precludes a claim for unjust enrichment where ... an express contract governs the same subject matter as the unjust enrichment claim." Liberty Mutual Br. at 55. But Liberty Mutual overstates the breadth of this rule, which holds that a claim in quasi-contract will not lie where "the scope of [an express contract] clearly covers the dispute between the parties." *Clark-Fitzpatrick v. Long Island R.R. Co.,* 70 N.Y.2d 382, 389 (1987). That is not the case here, since the Attorney General alleges misconduct antecedent to the formation of any contract, not misconduct in the course of performing under a contract.

All of the cases cited by Liberty Mutual on this point reject quasi-contract or unjust enrichment claims where the relevant rights and obligations of the parties were governed by an express contract. *See id.* (defendant allegedly failed to complete railroad construction project in accordance with contract); *Goldman v. Metro. Life Ins.,* 5 N.Y.3d 561 (2005) (defendants allegedly failed to provide insurance coverage for the full term provided for in contract); *Edward S. Gordon Co. v. TPD Corp.,* 233 A.D.2d 119 (1st Dep't 1996) (defendants allegedly failed to pay commission specified by contract); *Tierney v. Capricorn Investors, L.P.,* 189 A.D.2d 629 (1st Dep't 1993) (defendants allegedly failed to pay bonus owed under employment agreement). In essence, the courts ***34** held that unjust enrichment cannot be used as an alternative to a claim for breach of contract, and that a contract claim provides the only avenue for recovery to a plaintiff who challenges the adequacy of a defendant's performance under a contract. Here, by contrast, the Attorney General complains of Liberty Mutual's tortious and unlawful conduct in *procuring* insurance contracts. This dispute involves events prior to the formation of the insurance contracts, and those contracts naturally do not purport to govern the parties' respective rights and obligations in that arena.

Finally, there is no merit to Liberty Mutual's argument that no unjust enrichment claim will lie absent an allegation that "a service was provided to [Liberty Mutual] for which [it] did not pay." Liberty Mutual Br. at 56-57. As this Court's decision in *Cox* shows, provision of a service is not required to state a claim for unjust enrichment. Rather, a plaintiff may recover based on the allegation that deceptive practices induced him to pay an artificially inflated price for a product. *See* 8 A.D.3d at 40; *cf. Mfrs. Hanover Trust Co. v. Chem. Bank,* 160 A.D.2d 113, 116 (1st Dep't 1990) (sustaining claim based on principles of "unjust enrichment" where plaintiff made duplicative wire transfers to defendant bank). To the extent that *Phillips v. American International Group, Inc.,* 498 F. Supp. 2d 690, 698 (S.D.N.Y. 2007), and *Bello v. New England Financial,* 3 Misc. 3d 1109A (Sup. ***35** Ct. Nassau County 2004), can be read to hold otherwise, they are incorrect and contrary to this Court's precedent.

POINT II

THE ATTORNEY GENERAL STATED VALID CLAIMS AGAINST LIBERTY MUTUAL FOR USING CONTINGENT COMMISSION AGREEMENTS TO INDUCE PRODUCERS TO STEER BUSINESS TO IT

A. Liberty Mutual's Conduct Was Deceptive Under Executive Law § 63(12), Even If It Did Not Rise to the Level of Common-Law Fraud.

Liberty Mutual argues that all claims involving its payment of contingent commissions must be dismissed under this Court's decision in *Hersch,* which postdated Supreme Court's denial of the motion to dismiss. Liberty Mutual Br. at 22-24.[FN9] In *Hersch,* this Court dismissed an insured's claims against his insurance broker for misrepresentation, breach of contract, breach of fiduciary duty, and deceptive practices under General Business Law §§ 349(h) and 350 based on the broker's acceptance of contingent commissions without disclosure to the insured. 43 A.D.3d at 645.

FN9. The amended complaint also alleges that Liberty Mutual induced steering by Aon through the side agreement it executed regarding its reinsurance business (*see* R. 142). In this appeal, Liberty Mutual does not argue for the dismissal of the claims based on those allegations.

Unlike this case, however, *Hersch* was a private action, and thus the plaintiff could not and did not include any claim based on Executive Law § 63(12), which empowers the Attorney General alone to restrain a broad range of deceptive and illegal business ***36** practices harmful to the State's commercial environment. Because of its strong consumer-protection purpose, § 63(12) defines "fraud" expansively to include a great deal of conduct that is not actionable under common-law principles applicable in suits brought by private parties. Accordingly, as the Court of Appeals has observed, the statute reaches "all deceitful practices contrary to the plain rules of common honesty." *People v. Federated Radio Corp.,* 244 N.Y. 33, 38-39 (1926). As this Court has held, the test for fraud under § 63(12) is merely "whether the targeted act has the capacity or tendency to deceive, or creates an atmosphere conducive to fraud." *People v. Gen. Elec. Co.,* 302 A.D.2d 314, 314 (1st Dep't 2003); *see also People v. Apple Health & Sports Clubs,* Inc., 206 A.D.2d 266, 267 (1st Dep't 1994) (§ 63(12) includes "acts characterized as dishonest or misleading"). Given this liberal standard, a claim for "fraud" under § 63(12) does not require proof of the traditional elements of reliance, actual deception, or intent to deceive. *See Gen. Elec. Co.,* 302 A.D.2d 314; *Sonifer Realty,* 212 A.D.2d at 367; *Apple Health & Sports Clubs,* 206 A.D.2d at 267.

As set forth in the amended complaint, Liberty Mutual's conduct met the standard for fraud under § 63(12) - at a minimum Liberty's conduct "create [d] an atmosphere conducive to fraud" and carried "the capacity to deceive" customers. As one of the "biggest ... players" in the area of contingent commissions (R. ***37** 141), Liberty Mutual negotiated lucrative arrangements with producers to induce them to steer business its way, even as those producers were holding themselves out to clients as a source of unbiased advice about an array of insurance products. The complaint alleges that, just as Liberty intended, producers did not afford their clients the objective advice they promised, but instead consciously directed clients to more expensive or inferior Liberty Mutual policies because of the special contingent commission agreements Liberty had negotiated (see R. 140-142).

Because the causes of action dismissed in *Hersch* did not implicate the liberal liability standards of § 63(12), that decision does not require the dismissal of the Attorney General's claims under that statute. Nor are the Attorney General's §

63(12) claims inconsistent with this Court's statement in *Hersch* that "[c]ontingent commission agreements between brokers and insurers are not illegal ... and, in the absence of a special relationship between the parties, defendant had no duty to disclose the existence of the contingent commission agreement." 43 A.D.3d at 645. The Attorney General has not asserted that contingent commission agreements are illegal in all cases, or that the existence of such agreements must be disclosed in all cases. Rather, it is Liberty Mutual's inducement of producers to steer business to it without regard to clients' best interests that constitutes deceptive practices under § 63(12). It just so happens ***38** that the inducements here resulted primarily from special contingent commission agreements that Liberty negotiated with producers. In other cases, such inducements may well take other forms.

The Executive Law § 63(12) claims based on the inducement of steering through the use of contingent commissions are also pleaded with adequate specificity. Liberty Mutual argues that the complaint alleges "no misrepresentation or omission" on its part. Liberty Mutual Br. at 50. But because § 63(12) extends also to all acts that create "an atmosphere conducive to fraud," no particular misrepresentation by Liberty need be alleged. Nor is Liberty correct in faulting the complaint for alleging "no knowledge of any false statements, no inducement of reliance, nor actual reliance" (Liberty Mutual Br. at 50), since none of those is an element of § 63(12) fraud claim. *Gen. Elec.*, 302 A.D.2d at 315 ("neither bad faith nor scienter is required under Executive Law § 63 (12)"); *Sonifer Realty,* 212 A.D.2d at 367 ("reliance need not be shown in order for the Attorney General to obtain relief").

Nor is true that the complaint was required to allege actual injury to clients. Liberty Mutual Br. at 50. Because § 63(12) covers all acts that "create[] an atmosphere conducive to fraud" and that have "the capacity or tendency to deceive" even without specific proof of reliance, there is no requirement that the Attorney General show actual injury resulting from deceptive ***39** conduct. *Cf. Guggenheimer v. Ginzburg,* 43 N.Y.2d 268, 272-73 (1977) (making this point as to an analogous cause of action). But even if the Attorney General were required to allege injury, it did so by alleging that in response to Liberty's inducements, producers steered clients to "more expensive" policies (R. 141). To the extent Liberty Mutual faults the Attorney General for failing to identify specific insurance clients who were harmed (Liberty Mutual Br. at 51), such identification must await further discovery.

There is no merit to Liberty Mutual's argument that the amended complaint cannot succeed absent an allegation that "Liberty Mutual failed to perform under any insurance policy." Liberty Mutual Br. at 51. For this point, Liberty Mutual relies on *Maio v. Aetna Inc.,* 221 F.3d 472 (3d Cir. 2000), a Third Circuit decision addressing claims that do not resemble those here. In *Maio,* the plaintiffs claimed that they were injured because an HMO provided coverage that was inferior to that promised in promotional materials, but did not specify in any concrete way how the HMO had failed to deliver the promised quality of care. *See* 221 F.2d at 485. In this case, the Attorney General alleges not that Liberty Mutual failed to provide the level of coverage promised, but that Liberty Mutual induced producers to steer clients to policies that were more expensive than available substitutes offering the same coverage. As to that contention, it is immaterial whether Liberty ***40** Mutual "failed to perform under any insurance policy." Liberty Mutual Br. at 51.

Liberty Mutual further argues that the Attorney General has failed ?? explain how contingent commissions are more problematic than upfront commissions. Liberty Mutual Br. at 38. But as noted above, the real problem here is the presence of steering in derogation of clients' best interests, not the use of contingent commissions *per se.* If a case were to arise in which upfront commission arrangements were specifically crafted to induce, and did induce, such steering, that conduct would be actionable as well. In this case, however, the steering resulted from the "special" and "lucrative" contingent commission arrangements that Liberty Mutual entered into with producers (R. 140-141).

In any event, certain features of contingent commissions make them a greater threat to producer objectivity than upfront commissions. For example, while most insurance purchasers are at least generally aware that upfront commissions are paid, they may not know about the practice of paying contingent commissions. Further, the complexity of various contingent commission arrangements and the indeterminacy of the ultimate payments to be made pursuant to them pose obstacles to meaningful disclosure even in those cases where a client knows enough to request it.

Additionally, the contingent commission percentage for a given year often increases in stepwise fashion as a producer meets ***41** certain annual targets. At year end, producers can find themselves near the cusp of a particular target that, if met, would result in a huge increase in the contingent premium percentage for the producers' entire year of business with the insurer offering the commission. This creates overwhelming pressure on the producer to direct business to the insurer in question. The phenomenon is demonstrated in the amended complaint, which quotes a December 2003 e-mail from a Gallagher executive reminding associates that it was their "last chance to pump additional premium volume into [certain] markets so that it is included in the 2003 contingent income calculation" (R. 140).

B. To the Extent that *Hersch* Forecloses the Attorney General's Common-Law Claims, It Should Be Overruled.

As to the claims for common-law fraud, inducing a breach of a fiduciary duty to disclose, and unjust enrichment based on Liberty's use of contingent commissions, the Attorney General acknowledges that *Hersch* appears to foreclose those claims. Likewise, *Hersch's* holding that, absent a special relationship, brokers have no duty to disclose the existence of contingent commission agreements seems to preclude any claim here based on such nondisclosure alone. However, *Hersch* is wrongly decided and should be overruled. As discussed above, insurance brokers are agents of their clients, and therefore owe basic fiduciary duties ***42** of loyalty to those clients. Producers abdicate those duties when they steer clients to more expensive or inferior policies to serve their own financial interests, and insurers act tortiously when they induce such steering, whether through negotiating special contingent commission agreements or other means. Of late such steering has generally occurred as the result of contingent commission agreements. Indeed, as Liberty Mutual acknowledges, several major corporate insurance brokers, including Aon, Marsh, and Willis, have recently agreed in settlements with the Attorney General to stop accepting contingent commission payments. Liberty Mutual Br. at 7-8. This Court therefore should reconsider *Hersch* and on that basis uphold all the Attorney General's nonstatutory claims with respect to contingent commissions. *See Evvtex,* 102 F.3d at 1332 (recognizing that "[w]ithin the exercise of reasonable skill, care and diligence, [a broker] has a duty to disclose information.").

Apart from *Hersch,* Liberty Mutual raises a number of meritless objections to the fiduciary-duty claims involving payment of contingent commissions. Contrary to Liberty Mutual's suggestion, the amended complaint alleges that producers actually steered clients to less advantageous policies in order to increase their own contingent commissions (R. 140-142, see *also* R. 153-158), not merely that the contingent commission arrangements created "a *potential* for steering." Liberty Mutual Br. at 37. The complaint ***43** specifically alleges that brokers "acted on the incentives created by contingent commissions and steered business to Liberty Mutual" (R. 140), and that "[m]any Producers made systematic efforts to steer business in response to these [contingent commission] incentives" (R. 141). Moreover, while Liberty makes much of what it calls a "qualified allegation" that clients were steered to "perhaps inferior" policies (Liberty Mutual Br. at 37-38 [quoting R. 141]), it ignores the categorical allegation in the same paragraph that "customers ... were steered to more expensive ... products" (R. 141). That alone is sufficient to allege that producers breached their duties by placing their own interests above their clients' interests.

Liberty Mutual is also incorrect in arguing that the amended complaint fails to allege that Liberty knowingly induced producers' breaches of fiduciary duty. The complaint alleges that Liberty's very purpose in entering into the contingent commission arrangements was to induce producers to steer clients to Liberty Mutual policies (R. 140), despite producers' duties of loyalty to such clients. Moreover, Liberty Mutual was surely aware that producers owed such duties of loyalty under general agency principles. That suffices to support an inference of knowing inducement at the pleading stage. *See*

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Shearson Lehman Bros. v. Bagley, 205 A.D.2d 467 (1st Dep't 1994) (complaint sufficiently ***44** alleged knowledge by pleading that defendant engaged in scheme to defraud with person it knew to be employees of the plaintiff).

Nor is it true that the complaint fails to allege that producers' clients were damaged by their breaches of duty. Liberty Mutual Br. at 41. Paragraph 29 of the amended complaint alleges that "[t]he costs of th[e] steering scheme were borne by customers in New York State and throughout the United States who were steered to more expensive and perhaps inferior products" (R. 141). Equally misplaced is Liberty Mutual's argument that the complaint "alleges nothing more than that customers in a competitive market agreed to pay a certain aggregate amount in premium and commission for particular coverage." Liberty Mutual Br. at 41. The complaint alleges that Liberty Mutual prevented the proper functioning of the marketplace by inducing producers to steer clients to policies that were not in the clients' best interests, just so producers could maximize their own income.

***45** CONCLUSION

For the foregoing reasons, Supreme Court's decision denying defendants' motion to dismiss should be affirmed.

***46** PRINTING SPECIFICATIONS STATEMENT

Pursuant to Appellate Division Rule 22 N.Y.C.R.R. § 600.10.3(d)(1)(v), I hereby certify that the foregoing brief was prepared on a computer. A monosp?? ced typeface was used, as follows:

Name of Typeface:	Courier New
Point size:	12
Line spacing:	Double

The total number of words in the brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of citations, proof of service, certificate of compliance, or any authorized addendum containing statutes, rules, regulations, etc., is 9,940.

THE PEOPLE OF THE STATE OF NEW YORK by Andrew M. Cuomo, Attorney General of the State of New York, Plaintiff-Respondent, v. LIBERTY MUTUAL INSURANCE COMPANY, Liberty Mutual Fire Insurance Company, First Liberty Insurance Corporation, Liberty Insurance Corporation, Liberty Marine Underwriters, Inc., Employers Insurance Company of Wausau, Wausau Business Insurance Company, Wausau General Insurance Company, and Wausau Underwriters Insurance Company,
2008 WL 5934817 (N.Y.A.D. 1 Dept.) (Appellate Brief)

END OF DOCUMENT

P.L. 94-435, HART-SCOTT-RODINO ANTITRUST IMPROVEMENTS ACT OF 1976
House Report (Judiciary Committee) No. 94-499(I),
Sept. 22, 1975 (To accompany H.R. 8532)
House Report (Judiciary Committee) No. 94-499(II),
Nov. 4, 1975 (To accompany H.R. 8532)
House Report (Judiciary Committee) No. 94-1343,
July 15, 1976 (To accompany H.R. 13489)
House Report (Judiciary Committee) No. 94-1373,
July 28, 1976 (To accompany H.R. 14580)
Senate Report (Judiciary Committee) No. 94-803,
May 6, 1976 (To accompany S. 1284)
Cong. Record Vol. 122 (1976)
DATES OF CONSIDERATION AND PASSAGE
House March 18, August 2, 24, September 16, 1976
Senate June 10, September 8, 1976
House bill H.R. 8532 was passed in lieu of the Senate bill. The House Reports are set out.

(CONSULT NOTE FOLLOWING TEXT FOR INFORMATION ABOUT OMITTED MATERIAL. EACH COMMITTEE REPORT IS A SEPARATE DOCUMENT ON WESTLAW.)

HOUSE REPORT NO. 94-499(I)
Sept. 22, 1975

The Committee on the Judiciary, to whom was referred the bill (H.R. 8532), to amend the Clayton Act to permit State attorneys general to bring certain antitrust actions, and for other purposes, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

* * * *

I. PURPOSE

The purpose of H.R. 8532 is to provide a new federal antitrust remedy which will permit State attorneys general to recover monetary damages on behalf of State residents injured by violations of the antitrust laws. The bill is intended to compensate the victims of antitrust offenses, to prevent antitrust violators from being unjustly enriched, and to deter future antitrust violations.

II. SUMMARY OF REPORTED BILL

The first section establishes the bill's short title.

Section 2 contains the parens patriae provisions to be added as new sections of the Clayton Act (15 U.S.C. 12 et seq.). Proposed section 4C(a) authorizes State attorneys general to sue for damages on behalf of natural persons who have been injured by antitrust violations. Section 4C(b) authorizes the conversion of 4C(a) actions into class suits under certain circumstances. Section 4C(c) requires that individuals on whose behalf parens patriae suits are brought be notified. Se-tion 4C(d) provides an opportunity for individuals to exclude their claims from parens patriae suits. Section 4C(e) requires court approval of settlements of parens patriae cases. Section 4D provides that, in parens patriae cases and other antitrust class suits, damages may be proved and assessed in the aggregate by reasonable methods of estimation. Section 4E requires the opportunity for individuals to secure their appropriate share of the damages recovered, with any amount remaining to be distributed as the court directs. Section 4F(a) requires the U.S. Attorney General to notify appropriate State attorneys general of their entitlement to bring parens patriae cases. Section 4F(b) requires the U.S. Attorney General to make investigative materials available to State attorneys general in parens patriae cases.

Sections 3(1) and 3(2) amend existing sections of the Clayton Act to include parens patriae actions in that Act's statute of limitations and provision for tolling the statute of limitations, respectively. Section 3(3) amends the Clayton Act to require that plaintiffs who prevail in antitrust injunction cases be awarded reasonable attorney's fees.

III. BACKGROUND

The economic burden of many antitrust violations is borne in large measure by the consumer in the form of higher prices for his goods and services. This is especially true of such common and widespread practices as price-fixing, which usually result in higher prices for the consumer, regardless of the level in the chain of distribution at which the violation occurs. It is also true of other antitrust violations such as monopolization, attempts to monopolize, group boycotts, division of markets, exclusive dealings, tie-in arrangements, and conspiracies to limit production. All of these violations are likely to cause injuries to consumers, whether by higher prices, by illegal limitation of consumer choices, or by illegal withholding of goods and services. Moreover, antitrust violations almost always contribute to inflation. They introduce illegal and artificial forces into the market place, thus undermining our economic system of free enterprise.

Frequently, antitrust violations injure thousands or even millions of consumers, each in relatively small amounts. Indeed, many of the Justice Department's recent prosecutions have involved price-fixing of consumer goods on a local or regional basis. In the food industries alone, the Justice Department's cases have included price-fixing prosecutions involving bread and bakery products in the Philadelphia area, milk in Wyoming, dairy products in Colorado, Utah and Idaho, bread and bakery products in Baltimore and the Eastern Shore area of Maryland, milk in Washington and Alaska, soft drinks in Tulsa, bread in New York and Chicago, baking companies in San Diego and Louisiana, and sugar refiners nationally.

Although the antitrust laws have the immediate goals of protecting and promoting competition, it is the consuming public that ultimately benefits from the enforcement of the antitrust laws. Nonetheless, Federal antitrust statutes do not presently provide effective redress for the injury inflicted upon consumers. This lack of an effective consumer remedy sometimes results in the unjust enrichment of antitrust violators and undermines the deterrent effect of the treble damage action. H.R. 8532 fills this gap by providing the consumer an advocate in the enforcement process-- his State attorney general.

During the Subcommittee's hearings in the 93d Congress, Assistant Attorney General for Antitrust, Thomas Kauper outlined the problem in this way:

There can be no doubt that the treble damage remedy provides a strong deterrent, especially against price-fixing and other hard-core per se offenses. This damage remedy has been particularly effective in cases involving large purchasers, for these plaintiffs are likely to have detailed evidence, a sufficiently large economic stake to bear the inevitable risks of a lawsuit, and the resources to meet the apparently inevitable costs of protracted and complex litigation. However, the remedy has been less effective in circumstances involving multiple transactions of relatively small size, particularly purchases by ultimate consumers of products that may cost as little as

25 or 30 cents. There, records are not likely to be available, individual claims will be small, and the claimant less likely to have either the sophistication or resources necessary to prosecute their individual claims.

* * * *

I believe that there is a need for the availability of a method by which damages can be recovered where antitrust violations have caused small individual damages to large numbers of citizen-consumers. Without such a procedure, those antitrust violations which have the broadest scope and, often, the most direct impact on consumers would be most likely to escape the penalty of the loss of illegally-obtained profits. Those whose injuries were to small to bear the burden of complex litigation would have no effective access to the courts. As a result, the goal of deterrence sought by the Clayton Act would be frustrated in those situations where damages fell directly on small consumers or purchasers. [1]

Under the well established doctrine of parens patriae, States have successfully sued to halt continuing wrongs which injure or threaten to injure their citizens. The Clayton Act has been interpreted by the Supreme Court as authorizing States to maintain parens patriae lawsuits to enjoin violations of the antitrust laws when those violations are injuring the State's citizens. In Georgia v. Pennsylvania R.R., 324 U.S. 439, 451 (1945), [1a] the Court said that the State ‘as a representative of the public is complaining of a wrong which, if proven, limits the opportunities of her people, shackles her industries, retards her development, and relegates her to an inferior economic position among her sister States. These are matters of grave public concern in which Georgia has an interest apart from that of particular individuals who may be affected.‘

However, when the State of California recently tried to sue to recover monetary damages on behalf of persons who had allegedly been injured by the price-fixing of snack foods, the Ninth Circuit Court of Appeals held that parens patriae damage actions were not authorized by the Clayton Act. In large part, H.R. 8532 is a response to that case and a recognition that the consuming public currently has no effective means of obtaining compensation for its injuries.

An extremely important benefit which would flow from H.R. 8532 is the promotion of cooperation in antitrust enforcement between the States and the federal government. As Federal Trade Commission Bureau of Competition Director James Halverson put it during the Subcommittee's hearings this year:

There are certain violations of the federal antitrust laws which would be handled more efficiently by a parens patriae suit for damages than by a federal criminal proceeding or action for injunctive relief. An example of such a situation might be where a regional seller of consumer goods has recently discontinued anticompetitive practices that directly injured his customers. The best deterrent to a resumption of the illegal conduct might be a suit by the state which deprives the violator of the profits gained from his bad conduct and provides relief which compensates the injured consumers. [2]

A State attorney general is an effective and ideal spokesman for the public in antitrust cases, because a primary duty of the State is to protect the health and welfare of its citizens. He is normally an elected and accountable and responsible public officer whose duty is to promote the public interest.

IV. THE CONSUMER PRESENTLY HAS NO PRACTICAL MEANS OF REDRESS

Section 4 of the Clayton Act, 15 U.S.C. 15, provides a private cause of action for treble damages, costs and attorneys' fees for ‘any person . . . injured in his business or property by reason of anything forbidden in the antitrust laws.‘

Under this section, a State may sue to recover damages it has sustained in its capacity as a proprietor or purchaser of goods and services. [3] Likewise, under Sec. 4A of the Clayton Act, 15 U.S.C. 15a, the United States may sue whenever it is injured in ‘its business or property.‘ Neither the United States nor any State, however, may presently sue for damages in a representative capacity on behalf of injured citizens unless it has been injured in the same manner.

The impact of this legislative omission on effective antitrust enforcement has become clear in recent years as a result of developing judicial decisions. Under Sec. 4 of the Clayton Act, any person, including any consumer, who can prove he was injured by price-fixing or any other antitrust violation, has a cause of action. [4] In most instances, however, an individual law suit by an injured consumer is, as a practical matter, out of the question. If, for example, a price-fixing conspiracy results in an overcharge of a dollar on a relatively low priced consumer item, and 50 million such items are sold, the aggregate impact of the conspiracy upon consumers and the illegal profits of the price-fixers are not insignificant-- at least $50 million. [5] Yet no single consumer could practically be expected to bring suit. He would have no investigative resources-- or incentive-- to discover the conspiracy; should he become aware of the overcharge, he will almost certainly have no proof that he purchased the item at a particular time, place, and price; he will quite obviously have neither the incentive nor the resources to engage in protracted and extremely costly litigation to recover his tiny individual stake.

Attempts to use the revised class action provision of the 1966 amendments to Rule 23 of the Federal Rules of Civil Procedure to fashion a mechanism for consumer redress in this situation have been disappointing. Many courts have found that large consumer classes predicated upon small individual claims present insurmountable problems of 'manageability' in the conduct of the litigation. [6] These manageability problems include proper notice the complexity of evidentiary issues, and distribution of any recoveries. In Eisen v. Carlisle & Jacquelin, the Supreme Court interpreted Rule 23 to require class action plaintiffs to provide individual prelitigation notice to all identifiable members of the class regardless of the cost of providing such notice. In the 1975 hearings, the Director of the FTC's Bureau of Competition, James Halverson, explained that:

The practical effect of Eisen is to eliminate the Rule 23 class action as a feasible means for recovery by a large class of individuals each of whom has sustained relatively minor damages. In situations where the cost of giving notice to the class are much greater than any individual class member's stake in the outcome of the action, it is unlikely that any suit will be brought. The person who deals in certain types of consumer goods, where each transaction may involve only a few dollars, can not fix prices, relatively free from the fear of substantial treble damage actions.

A description of the facts in Eisen will indicate where the Supreme Court's decision has left the consumer class action. The plaintiff, in Eisen, who claimed personal damages of only $70, sought to represent a class of as many as 6 million persons who allegedly were injured as a result of violations of the antitrust and securities laws. It was calculated that that the cost of giving individual notice to all indentifiable members of the class would be about $315,000. The Court, in ruling that the plaintiff must give such notice, explicitly recognized that its decision sounded the death knell for Eisen's class action because the plaintiff was unlikely to expend $315,000 to proceed with a suit in which he had a stake of only $70. The immediate result was that the defendants retained the profits from their allegedly illegal activities. [7]

At a minimum, the new emphasis on the intricacies of class actions has simply added another round of expensive and delaying litigation on the very propriety of the validity, and therefore certification, of the class.

Individual suits and class actions have worked far better for business entities than for consumers injured by antitrust violations. Wholesales and retailers purchasing from price-fixing manufacturers will frequently buy in sufficient volume to give them a substantial incentive to sue. They maintain accurate purchase records which may be used as proof of purchase, and they will usually have access to attorneys and other resources for investigating the facts and prosecuting the litigation. Their numbers will be smaller, and ordinary business records and the records of trade associations will frequently ease the problem of identifying claimants, so that they will not face many of the obstacles encountered by consumers in class action litigation.

The result has been relatively effective antitrust enforcement where the violation has occurred high up in the chain of distribution, and where the impact has been upon other business entities. Where, however, wholesalers and retailers have passed on all or most of the cost of a violation to the consumer, or where the violation itself occurred at the retail level (hus subjecting the consumer to the major impact of the violation), [8] adequate enforcement mechanisms simply do not exist. The consumer, who benefits from the proper functioning of our free enterprise system with appropriate antitrust enforcement, has been without an effective method of redress of his grievances.

Frustrated by this gap, the State of California brought an action on behalf of its 20 million purchasers of snack foods, claiming they had been the victims of a price-fixing conspiracy and seeking to represent their interest in court. The Ninth Circuit Court of Appeals held in California v. Frito-Lay, 474 F.2d 774 (9th Cir.), cert. denied, 412 U.S. 908 (1973, [8a] that California could not maintain such a 'parens patriae' action for its injured and legally helpless citizens. The court applauded the State's imaginative approach to an obviously important problem, but held that, under the law, California could not recover damages on behalf of its citizens under the Clayton Act. Legislative action was needed, the court said, to enable the State to represent its injured citizens:

The State most persuasively argues that it is essential that this sort of proceeding be made available if antitrust violations of the sort here alleged are to be rendered unprofitable and deterred. It would indeed appear that the State is on the track of a suitable answer (perhaps the most suitable yet proposed) to problems bearing on antitrust deterrence and the class action as a means of consumer protection. We disclaim any intent to discourage the State in its search for a solution.

However, if the State is to be empowered to act in the fashion here sought we feel that authority must come not through judicial improvisation but by legislation and rule making, where careful consideration can be given to the conditions and procedures that will suffice to meet the many problems posed by one's assertion of power to deal with another's property and to commit him to actions taken in his behalf. [9]

H.R. 8532 is a response to the judicial invitation extended in Frito-Lay. The thrust of the bill is to overturn Frito-Lay by allowing State attorneys general to act as consumer advocates in the enforcement process, while at the same time avoiding the problems of manageability which some courts have found under Rule 23.

Support for these legislative goals was expressed in hearings by every witness before the subcommittee, including some who opposed substantial portions of earlier versions of the bill. The bill as reported by the committee is supported by the Department of Justice and the Acting Director of the Bureau of Competition of the Federal Trade Commission, and, generally, by the National Association of Attorneys General.

V. THE PROVISIONS OF H.R. 8532

H.R. 8532 employes an ancient concept of our basic English common law-- the power of the sovereign to sue as parens patriae on behalf of the weak and helpless of the realm-- to solve a very modern problem in antitrust enforcement. This doctrine is also firmly embedded in American jurisprudence. Since 1900 the Federal courts have expanded the power of a State to sue 'in her capacity as a quasi-sovereign or as agent and protector of her people against a continuing wrong done to them.' [10] The parens patriae doctrine already applies to antitrust injunction cases. H.R. 8532 extends the doctrine to permit States to protect their citizens by suing for damages when they are injured by antitrust violations. The following is a discussion of individual sections of the Bill.

SUBSECTION 4C(a)

This is the heart of H.R. 8532. It permits a State attorney general to bring parens patriae actions for treble damages 'on behalf of natural persons residing in such State injured by any violation of the antitrust laws.'

The subsection creates no new substantive liability. Each person on whose behalf the State attorney general is empowered to sue already has his own cause of action under section 4 of the Clayton Act, even if, for practical reasons, the right to sue is not likely to be exercised. Subsection 4C(a) thus provides an alternative means to make practically available Federal remedies at law, previously denied, for the vindication of existing substantive claims.It authorizes State attorneys general to sue for damages on behalf of injured persons, subject to the other provisions of the bill, namely, (1) the right of individuals to opt out under section 4C(d), (2) the extinction of the individual's right to maintain his own suit if he does not opt out, and (3) the right of the individual to receive his appropriate share of any recovery.

The establishment of an alternative remedy does not increase any defendant's liability. To the extent an antitrust violator was liable to an individual, H.R. 8532 would make the violator liable to either the individual or the State. The likelihood of a financial recovery against an antitrust violator, however, is significantly increased because H.R. 8532 creates an effective remedy where none existed before.

The subcommittee and the full committee gave extended consideration to the proper scope of the remedy. The original bill before the subcommittee, H.R. 38, would have permitted actions on behalf of ‘citizens‘ injured by antitrust violations. The subcommittee also considered using the terms ‘person‘ and ‘consumers‘; it concluded that ‘persons‘ was too broad a term as it might be construed to include business entities, which are able, in general, to fend for themselves. On the other hand, the term ‘consumers‘ was considered potentially too narrow and too prone to definitional problems.

The committee chose ‘natural persons‘ as the best expression of the goals of the legislation. The term is intended to exclude business entities such as corporations, partnerships and sole proprietorships. While some ‘natural persons‘ might be in a position to bring their own actions and some business entities might not, the committee concluded that these instances will be rare and that use of the phrase ‘natural persons‘ will permit actions on behalf of those most in need of representation but presently unrepresented. Moreover, the ‘opt-out‘ provision of subsection 4C(d) will preserve the separate law suit of any ‘natural person‘ who does not want the State attorney general to pursue his claim.

Under H.R. 8532, parens patriae actions may be maintained to recover damages for any antitrust injuries, except those resulting from violations of section 2 (price discrimination) and section 7 (anticompetitive mergers) of the Clayton Act. The Assistant Attorney General recommended that these sections not be included, and the committee agreed that they are not appropriate for parens patriae actions.

State attorneys general may retain outside private counsel to assist in the prosectuion of parens patriae cases. Private counsel may be especially necessary and useful when there is multistate litigation since private counsel may be better able to coordinate such litigation than any individual State attorney general. Private counsel may not, however, be retained or employed on a contingency fee basis under the committee's bill, because the committee felt that States should be encouraged to develop their own in-house antitrust capability.

SUBSECTION 4C(b)

Subsection 4C(b) provides the courts with a flexible alternative to the parens patriae action in those rare instances where a different approach is necessary to the efficient conduct of litigation. Under this section the court is empowered, on its own motion or that of any party, to order that an action originally filed as a parens patriae action be maintained as a class action. The attorney general may then represent an appropriate class or classes, regardless of whether he himself is a member of that class or of those classes.

Under the existing class action enforcement scheme, the courts have been reluctant to permit State attorneys general to act as representatives of classes of injured consumers, unless their States, or subdivisions thereof, have been injured in the same way as the other members of the class. [11] At one level, Sec. 4C(b) reflects the committee's disapproval of this unnecessarily narrow approach to the issue of adequate representation in antitrust class actions. [12]

The Judiciary Committee recognized that there may be occasions when extensive investigations and pretrial proceedings and the interests of all parties involved convince the court that, in the interests of justice, an action which was brought as a 4C(a) parens patriae lawsuit should be transformed to and maintained as a class action. It might, for instance, be fairer to all parties for the court to order that a parens patriae action become a 4C(b) action when both businesses and natural persons have been injured in exactly the same manner. Conversion to a 4C(b) action would be inappropriate except where the interests of justice would be served thereby. And it would clearly be inappropriate for a court to convert a 4C(a) action into a Rule 23 class action and, then, dismiss the case on grounds of unmanageability under Tule 23.

If a case is converted to a Sec. 4C(b) class action, the provisions of Secs. 4C(c), 4C(d), 4C(e), 4D, 4E, 4F(b), and 4G apply, even though they may be inconsistent with the provisions of Rule 23. ‘Adequacy of representation‘ may be an issue in Rule 23 actions because of the possibility that the representative may have a conflict of interest or otherwise be inadequate. No such issue should arise in parens patriae cases under section 4C(a) or 4C(b), however, absent extraordinary circumstances involving a particular State attorney general.

Subsection 4C(b) is designed to give the courts maximum flexibility to structure individual and consolidated actions to achieve the goal of full and fair adjudication of claims under the antitrust laws. [13] It will permit the courts to utilize the services of the attorney general in a broad representative capacity in those few cases where the parens patriae action would be clearly inappropriate.

The committee is clear in its preference for parens patriae actions under section 4C(a). One of the subsidiary purposes of H.R. 8532 is to avoid, in consumer actions, the cumbersome litigation of peripheral issues which under Rule 23 has sometimes become more time-consuming and costly than litigating the merits of the case. Only where some positive impediment to the maintenance of a parens patriae action exists should a court have to resort to the alternative provided by section 4C(b).

SUBSECTIONS 4C(c) AND 4C(d)

Subsections 4C(c) and 4C(d) must be read together; they are designed to protect the constitutional due process rights of each individual potential claimant and defendant.

The constitutional concept of due process in a civil case embodies at a minimum two components: notice that a court is about to take action which may affect a person's interests, and an opportunity to be heard in defense (or prosecution) of that interest. [14] At the same time, a defendant who litigates a case against a case against a person who purports to represent a particular class has a strong interest in being able to enforce the result against and avoid relitigation with any person who was supposedly represented in the action. That interest is given effective recognition in the legal doctrines of res judicata and collateral estoppel.

Subsection 4C(c) and 4C(d) serve these constitutional interests by providing all potential claimants in the parens patriae action with adequate notice that their interests are to be adjudicated and an opportunity to be heard in vindication of those interests. Simultaneously, they allow a defendant to plead the result as res judicata against all those represented by the State attorney general.

Under Sec. 4C(c), the attorney general in a parens patriae action is required to cause ‘notice thereof to be given by publication in accordance with applicable State law or in such manner as the court may direct: except that such notice shall be the best notice practicable under the circumstances.‘

The subsection reflects a committee preference for notice by publication in all cases where such notice would adequately serve the constitutional and other interests at stake. ‘Publication‘ should, of course, be taken in modern context to include employment of media such as radio and television, as well as traditional newspaper advertisement. [15] When there is no applicable State law, or where the manner of publication provided by State law would, in the court's judgment, be insufficient, the court should determine the method of publication.

The statutory preference for publication is qualified by the proviso that whatever form of notice adopted should be ‘the best notice practicable under the circumstances.‘ This language is taken from Rule 23 and from major Supreme Court decisions under the due process clause. These decisions require the court to engage in a delicate balancing process to determine what is the ‘best notice practicable under the circumstances.‘ This balancing test cannot be reduced to any specific written formula, but a few of the underlying principles are worth mentioning. Where the number of potentially affected parties is large and individual interests are small or remote, or where names and addresses are difficult or impossible to obtain, the due process clause does not rigidly require individual written notice of the litigation to be sent to each. [16]Moreover, where the requirement of individual written notice would frustrate a major legislative or judicial policy, that countervailing policy is entitled to considerable weight in the determination whether publication notice will suffice. [17]

In light of these factors and the historically fluid nature of due process requirements, the committee believes that the imaginative use of publication notice will suffice in the vast bulk of parens patriae antitrust suits. The numbers of potential claimants will frequently be very large, the absence of documented proof of purchase will make identification of individual claimants in many instances difficult or impossible and publication through newspapers, radio and television will frequently quite literally be ‘the best notice practicable.‘ At the same time, the strong public interest in enforcement of the antitrust laws against those who have injured large numbers of consumers would be frustrated by a rejection of publication notice in favor of something economically or otherwise impracticable. Only in extraordinary circumstances where publication notice would be manifestly unfair should courts require more.

Subsection 4C(d) provides that any person may exclude his claim from the parens patriae action by filing notice of intent to do so within 60 days after notice has been given. Failure to file such a notice of intent to exclude himself within the given time will result in a potential claimant being bound by the result in the parens patriae case, absent a showing of good cause for his failure. If an individual opts out, he may bring his own action under existing law.

Thus subsection 4C(d) provides protection for the potential claimant's interest in prosecuting his own action. At the same time it safeguards the res judicata rights of defendants against claimants who fail to come forward and exclude themselves from the representational action. In this regard it protects the right of a defendant to avoid duplicative liability.

SUBSECTION 4C(e)

Under Rule 41 of the Federal Rules of Civil Procedure parties to litigation are ordinarily allowed to dismiss or compromise the action without court approval. In Rule 23 class actions, however, settlements require court approval, which is intended to offer protection to the class members. Under Sec. 4C(e) of the bill, dismissal or compromise of a parens patriae action without the approval of the court is likewise prohibited. moreover, where an action is dismissed or compromised, notice must be given ‘in such manner as the court directs,‘ thus allowing dissatisfied claimants to object to the proposed settlement.

The committee views this section as an important safeguard for consumers in the event an attorney general seeks to terminate a parens patriae action by settlement.

Subsection 4C(e) serves a special prophylactic function, to protect members of the class from unjust or unfair settlements should their champion become fainthearted or inadequate in his representation. This section is intended to promote public confidence in the settlements of parens patriae cases by requiring court approval. As under Rule 23, it will be incumbent on the courts to consider carefully any proposed settlement and to approve that settlement only if it is fair and reasonable and in the interests of justice.

SECTION 4D AND 4E

These two sections deal with the measurement and distribution of damages once liability has been established. They must also be viewed and understood as a unit. Section 4D provides that a State attorney general may prove the damages suffered by a given class in the aggregate by statistical or other reasonable methods of estimation. Section 4E provides that any amounts left over after the satisfaction of individual claims shall be distributed as the court may direct. These sections address another major difficulty in the emerging Rule 23 case law. The potential difficulties of computing and distributing damages large classes of persons have led a number of courts to refuse to certify actions under Rule 23 on the grounds that they would be unreasonable. [18]

The fundamental premise of sections 4D and 4E with regard to the measurement, assessment and distribution of damages is that the antitrust laws should, at a minimum, provide an effective means whereby a plaintiff or plaintiff class can force a guilty defendant to part with all measurable fruits of his illegal activity as it relates to the plaintiff, multiplied threefold to reflect the factor Congress has determined is necessary as a punishment, as a deterrent, and as an incentive. This premise is in fall accord with established concepts of damages under the antitrust laws. The cases reiterate that defendants must disgorge ill-gotten gains; [19] and the standard rules for measuring damages allow a reasonable estimate thereof once the fact of injury has been established. [20]

Section 4D draws upon this established body of law by permitting a reasonable estimation of the amount of damage to the class as a whole in a parens patriae or Rule 23 antitrust class action. After the violation and the fact of some injury to the class have been proved, Sec. 4D permits the aggregation of the claims and amounts of injury to the members of the injured class without the requirement of separate proof of the fact and amount of injury to each individual member of the class. Questions relating to causation and the fact and amount of injury to a class may require the court to address such questions separately with respect to different groups within the class of natural persons.

Section 4D acknowledges the obvious reality that ‘it is far simpler to prove the amount of damages to the members of the class by establishing their total damages than by collecting and aggregating individual claims as a sum to be assessed against the defendants.‘ [21] In a price-fixing case, for example, frequently the only method of determining the total impact of the conspiracy will be to measure total illegal overcharges in defendants' total sales during the relevant period at the artificially high price to members of the injured class. Once this figure has been computed and assessed against the defendants, their real interests in the case is at an end. The question of how the sum assessed as damages should be distributed and employed is one in which the defendants have no interest. Their only proper remaining interest-- their res judicata rights-- are fully protected by Sec. 4C(d).

Aggregation of damages, as provided by Sec. 4D, is necessary because the proof of individual claims and amounts would be impracticable and virtually impossible. Parens patriae actions will normally be brought in instances where thousands or millions of consumers have been injured. Few consumers keep receipts for all the goods and services they purchase or use. In fact, individual receipts or records are not available on a great many consumer goods and services. Snack food machines, for instance, do not issue receipts. Without the aggregation provisions of Sec. 4D, antitrust violators would be able to injure most consumers with impunity, even if Sec. 4C(a) parens patriae actions were permitted. Section 4D is also necessary to avoid endless trials in which thousands or millions of individuals would have to appear to prove their individual claims and the amounts of their individual injuries. The section is needed to make parens patriae cases manageable and effective. It will reduce significantly the time and expense of the parties and it will simplify the job of the court. Section 4D also permits aggregation and estimation of damages in class actions brought by private parties under Sec. 4 of the Clayton Act. In this regard, the section overcomes some problems which have arisen in cases holding that large classes and the difficulties of damage proof render litigation unmanageable.

Section 4D is fair to both plaintiffs and to defendants. It changes the method by which damages are to be measured and assessed, but the defendant is entitled to a jury trial on the same issues as before. As in other antitrust cases, the pertinent issues of fact in a parens patriae case will be whether there was a violation of the antitrust laws, whether that violation caused an injury to the plaintiffs, and what the amount of damage was.

Section 4D does not permit speculative damages, but it does permit-- as the courts have done consistently-- the damages to be estimated reasonably. There is no injustice in permitting aggregation and estimation after the defendant's liability to the class has been established. The courts have long permitted damages to be proved in antitrust cases by a 'just and reasonable estimate of the damages based on relevant data.' [22]

As the Supreme Court put it almost 45 years ago in Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 563 (1931) [22a] :

Where the tort itself is of such nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts . . . (T)he risk of the uncertainty should be thrown upon the wrongdoer instead of upon the injured party.

The committee believes that a defendant who has committed an antitrust violation has no right, constitutional or otherwise, to the retention of one penny of measurable illegal overcharges or other fruits of the violation. This committee emphatically rejects the notion that our constitutional requirements are so rigid that they somehow require that each of millions of potential claimants for individually trivial sums be paraded through the court to prove his personal damages, when the best evidence and often the only appropriate measure of the scope of the violation is found in the records of the defendants themselves. A number of Federal courts have agreed. [23]

While the premise of Sec. 4D is that defendants should be made to disgorge all measurable profits from an antitrust violation, Sec. 4E, which applies only to parens patriae actions, recognizes that rarely, if ever, will all potential claimants actually come forward to secure their share of the recovery. Section 4E requires that all potential claimants be given a reasonable opportunity to claim their 'appropriate portion of the damages awarded less unrecovered costs of litigation and administration.' once this claims procedure has run its course, Sec. 4E commits the disbursement of the undistributed portion of the fund, which will often be substantial, to the discretion of the court. The funds remaining should be used for some public purposes benefiting, as closely as possible, the class of injured persons.

Section 4E thus adopts a concept developed in highly imaginative fashion by a number of courts over the years. The judicial antecedents of Sec. 4E include cases in which recoveries for illegal overcharges on bus and taxi fares were applied to reduce those fares in future years. [24] and the innovative application of illegal overcharges in the antibiotic drug industry to a variety of programs beneficial to the drug-consuming public. [25] These include the expansion of State-sponsored health programs, medical research, the training of nurses and paramedical personnel, the staffing of medical and rehabilitation clinics, and other similar programs. [26]

The committee considered and squarely rejected arguments that this method of applying damage recoveries to the general benefit of the injured class is unconstitutional. [27] Once it is acknowledged that the antitrust violator has no constitutional right to retain the profits of his illegal activity, it becomes clear that he has no constitutionally protected interest in how those profits are distributed for the benefit of those whom he has injured. Using the antibiotic litigation example, neither the public nor a person who has been illegally overcharged for his antibiotics receives an unconstitutional 'windfall' at the expense of the price-fixer when the fruits of the conspiracy are used to establish a medical clinic in his neighborhood. The only alternative-- retention of the profits by the adjudicated wrongdoer-- is unconscionable and unacceptable. [28]

SECTION 4F

Section 4F promotes parens patriae actions as a major aspect of antitrust enforcement by encouraging Federal-State cooperation. The section provides that whenever the United States has brought suit in its proprietary capacity under Sec. 4A of the Clayton Act, and the U.S. Attorney General believes that the same antitrust violation may have given rise to potential parens patriae claims, he shall notify the appropriate State attorneys general. Whenever a State attorney general so requests, in order to evaluate the notice from the U.S. Attorney General or in order to bring a parens patriae action, section 4F(b) requires the U.S. Attorney General to make the Justice Department's investigative files available to the State attorneys general ‘to the extent permitted by law.‘ This means that the files are to be made available except where specifically prohibited.

Section 4F(b) reflects the committee's desire that the Federal Government cooperate fully with State antitrust enforcers.

The benefits of increases in Federal-State cooperation and coordination of antitrust enforcement are obvious, and are achieved in H.R. 8532 without the expenditure of additional Federal funds.

SECTION 4G

Section 4G defines the terms used in Secs. 4C, 4D, 4E, and 4F.

The term ‘state attorney general‘ is defined as the ‘chief legal officer of a State, or any other person authorized by State law‘ to bring parens patriae actions. Since ‘State‘ is defined to include the District of Columbia, the Commonwealth of Puerto Rico and the territories and possessions of the United States, it thus includes the Corporation Counsel of the District of Columbia, and it includes any legally appointed special prosecutors.

The committee strongly supports the development of ‘in-house‘ State antitrust capabilities. At the present time, regrettably, only a few States have the staff and financial ability to prosecute protracted antitrust cases without the assistance of retained private attorneys. Especially in consolidated multistate litigation, retained counsel may well be both necessary and entirely proper for parens patriae cases.

Nonetheless, the Judiciary Committee believes that certain types of fee arrangements between States and private attorneys may inhibit the development of State antitrust capabilities. The definition of State attorney general, therefore, specifically prohibits parens patriae cases to be brought by ‘any person employed or retained on a contingency fee basis.‘

Suits in the name of a State are an exercise of State power. The committee believes that the States should exercise control over the use of State power not only in theory but in fact. If a State attorney general were able to delegate this function to private counsel on a contingency fee basis, the political and financial stake he would experience in otherwise prosecuting the action would be substantially diminished. And thus State power would be exercised without the guarantee of State supervision.

The committee bill excludes the use of fee arrangements whereby a State agrees to pay a private attorney a percentage of the recovery if the attorney wins the parens patriae case for the State. H.R. 8532 also prohibits any contracts which make the outside counsel's fee or the amount thereof contingent on the amount, if any, of the recovery or on whether there is a recovery.

The term ‘State‘, as used in proposed Secs. 4C, 4D, 4E, and 4F includes the District of Columbia, the Commonwealth of Puerto Rico, and the territories and possession of the United States.

As used in the parens patriae sections, especially Sec. 4C, the term ‘antitrust laws‘ excludes sections 2 and 7 of the Clayton Act. Section 2 is the Robinson-Patman Act, which concerns price discrimination, and section 7 is the section which prohibits mergers which are anticompetitive.Assistant Attorney General Thomas Kauper recommended that these provisions be excluded from the violations for which State attorneys general could recover damages in parens patriae actions. The committee believes that evolving standards of damage assessment under these sections are in sufficiently embryonic stages that further evaluation is necessary before permitting statewide actions of a parens patriae nature. 29

Finally, the bill defines the term ‘natural persons‘ so as to exclude sole proprietorships and partnerships. This provision is discussed in connection with Sec. 4C(a).

SECTION 3-ADDITIONAL AMENDMENTS TO THE CLAYTON ACT

Section 3 of H.R. 8532 amends the Clayton Act's provisions concerning the statute of limitations, tolling that statute during the pendency of Government actions, and the injunction section.

Section 3(1) amends the statute of limitations provision to include parens patriae actions under section 4C within the 4-year statute of limitations.

Section 3(2) conforms the tolling provision of the Clayton Act so that States' rights of action under section 4C will be treated the same as other rights of action for which the statute of limitations is tolled (staved) pending the outcome of antitrust civil or criminal cases brought by the United States.

ATTORNEYS' FEES IN INJUNCTION CASES

Section 3(3) of H.R. 8532 provides that in parens patriae injunction cases and in all other private antitrust cases, a prevailing plaintiff shall be awarded reasonable attorneys' fees.

The Clayton Act is intended to provide a sufficient incentive for private parties to sue antitrust violators to redress their grievances effectively. That incentive is primarily achieved by permitting a winning plaintiff to recover treble damages for any injuries he has sustained as a result of the defendant's violation of the antitrust laws.

Another significant incentive provided in Sec. 4 of the Clayton Act is the requirement that a losing defendant in a damage case pay for a ‘reasonable attorney's fee‘ for a winning plaintiff. Because antitrust cases are frequently lengthy and complicated, they are normally very expensive for a person to bring and maintain. Attorneys' fees, therefore, comprise by far the largest portion of the legal expenses incurred in maintaining a private antitrust lawsuit. Since the award of attorneys' fees is made in addition to the treble damage award, a prevailing plaintiff is able to pay for the services of his attorney without having to reduce his damage award. The attorneys' fee provision thus preserves the incentive for a private party to file a meritorious lawsuit.

The injunctive provisions of Sec. 16 of the Clayton Act, 15 U.S.C. 26, however, are silent on the subject of awarding attorneys' fees to prevailing plaintiffs. Until recently, the U.S. courts of appeals were split over whether attorneys' fees could be awarded in antitrust injunction cases. Such fees were disapproved in Decorative Stone Co. v. Building Trades Council of Westchester County, 23 F.2d 426 (2d Cir.), cert. denied, 277 U.S. 594 (1928), [29a] but they were approved in ITT v. General Telephone & Elec. Co., 43 U.S.L.W. 2466 (9th Cir., April 25, 1975).

The issue of attorneys' fees in Sec. 16 injunction cases was apparently disposed of on May 12, 1975, [29b] when the Supreme Court rules in Alyeska Pipeline Service Co. v. Wilderness Society, 95 S.Ct. 1612 courts have no power to award attorneys' fees in the absence of specific statutory authority. While Alyeska was not an antitrust case, the principle apparently applies to cases brought under section 16 of the Clayton Act. The court noted in Alyeska that:

It is true that under some, if not most, of the statutes providing for the allowance of reasonable fees, Congress has opted to rely heavily on private enforcement to implement public policy and to allow counsel fees so as to encourage private litigation. Fee-shifting in connection with treble damage awards under the antitrust laws is a prime example. 95 S.Ct.at 1624.

Alyeska invited Congress to enact specific legislation authorizing the award of attorneys' fees when there is a strong public policy. In the case of Sec. 16 antitrust injunction actions, there is such a compelling public policy to justify the award of attorneys' fees, and Sec. 3(3) of H.R. 8432 provides the specific legislative authority necessary.

The antitrust laws clearly reflect the national policy of encouraging private parties (whether consumers, businesses, or possible competitors) to help enforce the antitrust laws in order to protect competition through compensation of antitrust victims, through punishment of antitrust violators, and through deterrence of antitrust violations. Litigation by ‘private attorneys general ‘ for monetary relief and for injunctive relief has frequently proved to be an effective enforcement tool. Alyeska, however, has apparently eliminated the possibility that prevailing plaintiffs can recover attorneys' fees in meritorious and successful injunction cases. As such, Alyeska creates a significant deterrent to potential plaintiffs bringing and maintaining lawsuits to enjoin antitrust violations. Without the opportunity to recover attorneys' fees in the event of winning their cases, many persons and corporations would be unable to afford or unwilling to bring antitrust injunction cases.

Indeed, the need for the awarding of attorneys' fees in Sec. 16 injunction cases is greater than the need in Sec. 4 treble damage cases. In damage cases, a prevailing plaintiff recovers compensation, at least. In injunction cases, however, without the shifting of attorneys' fees, a plaintiff with a deserving case would personally have to pay the very high price of obtaining judicial enforcement of the law and of the important national policies the antitrust laws reflect. A prevailing plaintiff should not have to bear such an expense. Section 3(3) of H.R. 8532, therefore, is intended to reiterate congressional encouragement for private parties to bring and maintain meritorious antitrust injunction cases. Under this section, a plaintiff who substantially prevails would be entitled to the award of ‘reasonable attorneys' fees.‘

In addition to private parties, States would be entitled to recover reasonable attorneys' fees whenever they prevail in Sec. 16 cases.

VI. COMMITTEE ACTION

In March 1974, during the 93d Congress, the Judiciary Subcommittee on Monopolies and Commercial Law conducted 2 days of hearings on H.R. 12528 and H.R. 12921. Identical bills, H.R. 38 and H.R. 2850, were introduced during the 1st session of the 94th Congress, and the subcommittee held an additional 2 days of hearings in February and March 1975. The subcommittee received testimony from Assistant Attorney General for Antitrust Thomas Kauper, the Federal Trade Commission's Director of the Bureau of Competition James Halverson, National Association of Attorneys General Antitrust Committee Chairman Andrew Miller (attorney general of Virginia), representatives of the attorneys general of Connecticut, New York, Ohio, and California, and representatives of the private antitrust bar and of private industry. In addition, the subcommittee received correspondence or prepared statements from several Members of Congress, a total of 38 State attorneys general, the Mayor of Washington, D.C., the American Bar Association's Section on Antitrust Law, the Chamber of Commerce, the National Association of Manufacturers, the Consumers Union, and other persons and organizations.

In public session on May 7, 1975, after 4 days of marking up H.R. 2850, the Subcommittee on Monopolies and Commercial Law ordered 11 to 2 that the amended version, H.R. 6786, be introduced and reported favorable to the full Committee on the Judiciary. On July 10, 1975, in public session, the subcommittee agreed by unanimous consent to reconsider H.R. 6786, which was then amended. By a 9 to 2 vote, the subcommittee ordered the favorable report of a clean bill, H.R. 8532, to the full Committee on the Judiciary. In public session on July 22 and 24, 1975, the committee considered and amended H.R. 8532, and on July 24, the committee by voice vote ordered that H.R. 8532, as amended, be reported favorably to the House.

VII. INFORMATION SUBMITTED PURSUANT TO RULES X AND XI

A

Clause 2(1)(3) of Rule XI is not applicable. Section 308(a) of the Congressional Budget Act of 1974 will not be implemented this year. See last paragraph of House Rept. No. 94-25, 94th Cong., 1st session (1975).

B

No estimate or comparison from the Director of the Congressional Budget Office as received.

C

No related oversight findings or recommendations have been made by the Committee on Government Operations under clause 2(b)(2) of Rule X.

D

Pursuant to Clause 2(1)(4) of Rule XI, the committee believes that H.R. 8532 can be a major force in combating the present inflationary spiral, and can have a significant anti-inflationary impact on prices and costs in the operation of the national economy.

In August of 1974, the Assistant Attorney General in charge of the Justice Department's Antitrust Division estimated that ineffective competition in the Nation's economy was adding $80 billion annually to prices paid by consumers. An FTC Commissioner estimated that consumer costs rose as much as $10 billion annually because of price fixing violations alone. The President of the United States, in October, 1974, also recognized and endorsed the anti-inflationary effect of vigorous enforcement of the antitrust laws. In the 93d Congress, the Joint Economic Committee also concluded that it is vitally important to strengthen competition not only to curtail inflation, but also to preserve the free market system itself.

Thus while the precise extent of the inflationary impact of antitrust violations cannot be determined, it is clear that they introduce foreign and artificial forces exerting upward pressure on prices. By providing more effective enforcement of the antitrust laws on a large scale, H.R. 8532 should contribute to a reduction in the level of these forces.

Compensating antitrust victims and preventing violators from being unjustly enriched will not alone reduce consumer prices and combat inflation. But, to the extent that the individual States develop credible antitrust enforcement capabilities, H.R. 8532 will help to convince potential antitrust offenders that violations will not be profitable. The bill gives the States the opportunity to deter future antitrust violations, but the deterrence will depend entirely upon the States' taking advantage of their opportunities to bring parens patriae cases. If States use H.R. 8532 responsibly and are able to deter antitrust violations, then H.R. 8532 will have an anti-inflationary impact locally and regionally, at least, by reducing imperfect competition's contribution to inflation.

MINORITY VIEWS OF MESSRS. HUTCHINSON, RAILSBACK, WIGGINS, MOORHEAD, ASHBROOK, HYDE AND KINDNESS

In the name of providing a legal remedy to those who, as a practical matter, have none, this bill charges far beyond the mark to impose a mandatory irreducible fine on violators of the antitrust laws. Although this remedy is deemed civil, it partakes of both civil and criminal aspects. In doing so, the remedy fails to meet ordinary standards for civil or criminal remedies. As a civil remedy, the damages paid generally will not be paid to compensate victims for their losses. As a criminal remedy, the damages paid will be a mandatory fine, often astronomical, but irreducible, without regard for the interests of justice in the specific case. In our opinion, this legislative remedy presents the worst of both worlds.

We agree that the bill establishes no new substantive liability. No new antitrust violations are created. However, the bill does establish procedural machinery for the calculation and imposition of damage awards that undoubtedly will revolutionize the law of antitrust damages.

It will be said that all this bill does is to allow defendants' current potential liability to become realized, and that to oppose this legislation is, in effect, to oppose the promise of section 4 of the Clayton Act, now over 60 years old. But since the logic of a single idea does not take account of competing ideas, one may by mere logical extensions step over the precipice.

This bill does go too far. It is critical to note that this bill operates in an area where the claimants are often nameless, unidentified, unidentifiable, and ignorant of the trivial injury allegedly suffered and ignorant of who inflicted it. Nevertheless, the bill extracts from defendants three times the damages sustained. Why? Because, it is suggested, that's the way it's done in antitrust law.

But the purpose of treble-damage awards in antitrust law as we understand it is to compensate victims for their injury and to provide the incentive for bringing the action. But in the typical case envisioned by this bill-- for example, one involving price-fixing bread-- there is no incentive to bring the case even though treble damages are obtainable and there generally are no provably known victims to compensate. What the treble-damage award really is in this context is punishment.

Although we believe wrongdoers should not be allowed to retain ill-gotten gains, this principle does not compel the imposition of treble damages. It is respectfully suggested that payments exacted from defendants which, as a general matter, will not go to compensate victims for losses and which will be put to some noble purpose at the discretion of the court may be more accurately termed ‘fines‘ than damage awards.

But the fines imposed by this bill-- and this is critical-- may not be imposed commensurate with the interests of justice. The committee rejected an amendment that would have permitted the court to take into consideration the ‘defendant's degree of culpability, any history of prior such conduct, ability to pay, effect on ability to continue to do business and such other matters as justice may require.‘ Although these actions may be filed on behalf of millions of unknown individuals and involve millions of dollars, the resultant award must be arbitrarily calculated and may not be reduced even if the interests of justice so require.

The imposition of minimum mandatory penalties may have its place in the law, but such penalties are established at the low end of the scale so as to be ‘just‘ in every application. No so with these fines, which may run into millions of dollars. Moreover, such penalties envision a range of choices from which the court, in the interests of justice, might fashion an appropriate penalty. But this bill goes far beyond that. Under this bill once the extent of the injury is shown, the imposition of the fine, both in fact and in amount, is automatic.

It is argued that it is no concern to the defendant to what purpose the award is put after it has paid it. The argument misses the point. It should be of concern to the Congress how necessary it is to inflict possibly astronomical awards, definitionally three times the damage done, when there is no interest among the victims in bringing the case and where there are no provably known victims or only a few able to make claim against the award.

If the purpose is not to compensate in the manner of a civil remedy, it must be to punish and deter in the manner of a criminal penalty. But as a criminal penalty, it is harsh and arbitrary. If the major part of an award is committed to the discretion of the court to be used for some related purpose, it is difficult for us to understand how the purpose, to be fashioned by the court after the case is heard, must be satisfied by an amount which is exactly three times the damage proven to have been done by the defendant.

The purpose fashioned by the court will be a public one. For example, it is suggested that in a case involving the price-fixing of drugs, it is appropriate to commit the award to support a drug clinic. But it is patently clear that the needs of the drug clinic do not define the amount of the award. Nor does the need to compensate, nor does the need to provide incentives for enforcement, as stated before.

We believe that the public interest served by the channeling of the award to some analogous purpose must also admit other factors. For example, if the award is such that it will require the defendant to liquidate assets and lay off employees from work, there may be circumstances where the economic well-being of the community should be a matter for the court to consider in determining whether the defendant should be required to pay the full amount.

The provisions of the bill treating with the aggregation and distribution of damages are the crux of this legislation. We believe they are the wrong answer to the problem. Beyond that we believe that the bill will be subject to much abuse. By calling on the State attorneys general to champion these antitrust actions, the bill seeks to provide a political incentive for antitrust enforcement in cases where even treble damage awards provide no economic incentive.

We believe that politics and antitrust will not make a happy marriage. The temptations for the politically ambitious to ride into the public eye as its champion against 'fat cat' antitrust violators by filing lawsuits to the sound of political trumpets may be too great. Since antitrust cases take years to complete, the politically ambitious attorney general need not fear the embarrassment of a string of losses. In any event, many of the cases will have been undoubtedly settled because of their adverse publicity and their nuisance value. The bill underscores how quickly we have forgotten the lesson many thought we learned last year that politics and antitrust should not be mixed.

Finally, in our opinion, the committee report foes not correctly describe the notice requirements of the bill. In subcommittee there was substantial debate on the quality of the notice to claimants that should be required. It was recognized that to require only publication notice would certainly streamline the lawsuit, but it was likewise conceded that such a provision without more would be susceptible to constitutional attack on due process grounds in instances where the names and addresses of the claimants were known but where mailed notice-- the best notice practicable-- was not given. Thus in order to insulate the bill from litigation over its procedure and to eliminate the notice issue as a matter of controversy the subcommittee adopted the proviso that the notice had to be the 'best notice practicable, ' which the committee ratified without further debate. Although the report correctly describes where the phrase is found in the Federal rules of civil procedure and in case law, other language of the report can be fairly read to give this phrase of art a new meaning. The repot suggests that the test for adequacy of notice is not whether it is 'best' for the claimants to be notified but whether it is 'best' for the policy of authorizing parens patriae actions against antitrust violators. Such a suggestion is foreign to the intention expressed in adopting the language explained in the report.

For these reasons we respectfully dissent.

EDWARD HUTCHISON.
TOM RAILSBACK.
CHARLES E. WIGGINS.
CARLOS J. MOORHEAD.
JOHN M. ASHBROOK.
HENRY J. HYDE.
THOMAS N. KINDNESS.

SEPARATE VIEWS OF MS. JORDAN

I wholeheartedly support this bill. As a sponsor of the original measure I believe it represents a vital step forward in both general antitrust enforcement and consumer protection.

I am seriously concerned, however, with one amendment adopted by the committee, which may have the effect of undermining a great deal of what the bill is intended to accomplish.

Section 4G, as amended, by its definition of a 'State Attorney General, ' effectively precludes the States from employing knowledgeable private counsel on the basis of any 'contingency fee.'

The amendment has, I believe, two laudable purposes, namely to encourage States to develop their own antitrust capabilities and to protect them from potential gouging by lawyers who take cases on a flat percentage fee, thus sometimes winding up with unjustifiable windfall fees.

I am in sympathy with both these objectives. Indeed, I would favor an amendment to provide Federal assistance to the States to develop antitrust litigation capabilities. However, I think it is unrealistic to believe that more than a handful of States will be in a position to conduct a significant amount of such litigation on their own in the forseeable future. And some States will never have the resources or the interest to hire and train the large staffs which antitrust litigation requires.

Thus there will persist for the forseeable future a critical need to enlist the services of the private bar if the bill is to have any real impact. I am concerned that a flat ban on ‘contingency fees‘ will effectively place the services of perfectly ethical and highly knowledgeable attorneys beyond the reach of the States.

Most plaintiff's antitrust litigation, like most plaintiff's litigation in general, is conducted presently on a contingent fee basis. Section 4 of the Clayton Act anticipates this. It provides for the court to award a reasonable attorney's fee to a prevailing plaintiff, in addition to his treble damage recovery. Thus for the most part, lawyers agree to take antitrust cases for plaintiffs in return for whatever fee the court awards them at the successful conclusion or settlement of the action. Without such arrangements, there would be precious little private antitrust enforcement, since few, if any, plaintiffs will be able to pay the normal hourly rate of experienced counsel without regard to the outcome of the case. States, while in a better financial position than ordinary private plaintiffs, will likewise be unable in most instances to commit the required sums to a major case in advance, win or lose.

In some instances, contingency fees can involve overreaching. I do not personally approve of arrangements whereby the lawyer receives both the court-awarded ‘reasonable fee‘ and a percentage of the recovery on top of that. However, I fear that the committee, by striking at the overreaching may have seriously undermined the entire scheme of treble damage prosecution.

At the very best, the amendment adopted by the committee regarding ‘contingency fees‘ creates dangerous ambiguities with respect to permissible fee arrangements. It does not specify what contingent elements must be present in order to render an arrangement unacceptable, and it is clear that not all uncertainty as to final amount will render a fee ‘contingent.‘ Even where the lawyer is being paid an hourly charge, he will usually have little idea at the outset what his actual fee will be. The committee amendment could, therefore, be open to an interpretation which would salvage fee contracts dependent for their ultimate amount on some unknown element, such as the award of the court at the conclusion of the case. The risk is very great, however, that a court would determine that the arrangement was ‘contingent‘ if some element of success-- either at settlement or at trial-- made the difference between a large fee for the lawyer and a low, probably uncompensatory one.

I think that risk is unacceptable, since States are certain to be dependent for many years upon the services of expert private counsel, whom they will be unable to compensate on a hourly basis without regard to the outcome of the case.

There is another vital point at stake. The contingent fee is not merely an honorable means of financing litigation for those who would otherwise be unable to afford it until the award of final judgement. It is also recognized as an important tool for weeding out the frivolous and unmeritorious case on the basis of expert assessment. It is highly unlikely that a lawyer knowledgeable in any field will be prepared to invest large quantities of his own time and effort in a case on the basis that he will be uncompensated unless he obtains a successful result for the client, unless he believes after careful examination that the case has serious merits.

This point is responsive to two concerns which have been expressed by opponents and critics of the bill. Business interests have argued that the enactment of this legislation will bring a plethora of unfounded lawsuits for enormous sums of money, which they will have to defend at great expense. And members of the committee have on several occasions questioned whether the law might not present irresistible temptations to politically ambitious State officials bent on making a reputation without regard to the ultimate disposition of the cases they bring.

Neither of these unfortunate predictions is remotely likely to come true if the economic judgment of the legal experts is invoked in the evaluation of cases through the use of the contingent fee.

Hon. BARBARA JORDAN.

* * * *

N1 Hearings on H.R. 12528 and H.R. 12921 Before the Monopolies and Commercial Law Subcomm. of the House Comm. on the Judiciary, 93d Cong., 2d Sess., ser. 43, at 27 (1974) (emphasis added) (hereinafter cited as 1974 Hearings).

1a 65 S.Ct. 716, 89 .Ed 1051.

2 Hearings on H.R. 38 and H.R. 2850 Before the Monopolies and Commercial Law Subcom. of the House Comm. on the Judiciary, 94th Cong., 1st Sess., ser. 3, at 16 (1975) (hereinafter cited as 1975 Hearings).

3 State and local governmental units have been recognized as ‘persons ‘ under Sec. 4 and its predecessor for the purpose of bringing proprietarial damage actions since at least 1906. See Chattanooga Foundary & Pipe Works v. City of Atlanta, 203 U.S. 390 (1906) 27 S.Ct. 65, 51 L.Ed. 241.

4 Some courts initially interpreted the Supreme Court's decision in Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481 (1968) 88 S.Ct. 2224, 20 L.Ed.2d 1231, rehearing denied, 87 S.Ct. 64, 393 U.S. 901, 21 L.Ed.2d 188, and 89 S.Ct. 65, 393 U.S. 901, 21 L.Ed.2d 188, to limit standing to sue to the first purchaser of a price-fixed product. In Hanover Shoe the Court refused to allow a defendant to escape liability by asserting that his purchaser had passed on any illegal overcharge to the ultimate consumer. A major concern of the Court was to prevent the violator from retaining the ill-gotten gains of his illegal behavior. The Court noted that if the first purchaser was denied standing the ultimate consumers would have neither the incentive nor the ability to bring effective actions for return of the overcharges. 392 U.S. at 494.

More recently lower courts have recognized the pro-enforcement thrusts of Hanover Shoe and have held that plaintiffs at lower levels of the chain of distribution may attempt to prove that illegal overcharges were in fact passed on to them. See, e.g., In re Western Liquid Asphalt Cases, 487 F.2d 191 (9th Cir. 1973).

5 The amount of the overcharge, of course, may not represent either the total social cost of the violation or the total of recoverable damages flowing therefrom. See, e.g., Flintkote Co., v. Lysfjord, 246 F.2d 368, 389-90 (9th Cir.), cert. denied, 355 U.S. 835 (1957) 78 S.Ct. 54, 2 .Ed.2d 46.

6 See, e.g., Dodson Stores, Inc. v. American Bakeries Co., 1973-1 Trade Cases, #74,387 (SD.NY. 1973) (all purchasers of bread in the New York metropolitan area); United Egg Producers v. Bauer Int'l Corp., 312 F.Supp. 319 (S.D.N.Y. 1970) (all purchasers of eggs in the United States).

7 1975 hearings, 16.

8 A single antitrust violation, it must be noted, may cause multiple injuries, and each individual or business which is injured in its business or property has a right to recover damages. A violation occurring at the retail level may, in addition to raising consumer prices, injure other retailers who compete with the violators.

8a 93 S.Ct. 2291, 36 .Ed.2d 974.

9 474 F.2d at 777.

10 Georgia v. Pennsylvania R.R., 324 U.S. 439, 443 (1945) 65 S.Ct. 716, 89 .Ed. 1051. For an historical discussion of the parens patriae doctrine in American law, see Hawaii v. Standard Oil Co., 405 U.S. 251, 257-260 (1972) 92 S.Ct. 885, 31 L.Ed.2d 184.

11 See, e.g., California v. Frito-Lay, Inc., 474 F.2d 774 (9th Cir.), cert. denied, 412 U.S. 908 (1973) 93 S.Ct. 2291, 36 L.Ed.2d 974.

12 As one court put it, 'it is difficult to imagine a better representative of the retail consumers within a State than 'State's attorney general.' In re Antibiotic Antitrust Actions, 333 F.Supp. 278, 280 (S.D.N.Y. 1971).

13 Once a parens patriae action has been converted to a class action under subsection 4C(b), it is not intended to limit in any fashion the existing discretion of the court to define classes and subclasses and to designate appropriate parties to provide adequate representation. To the contrary, the intent is to make clear the breadth of that discretion. Thus the attorney general could, under subsection 4C(b), be designated to act as a representative of a class including business entities, notwithstanding the fact that he could not initially have brought a subsection 4C(a) action on behalf of such entities. Likewise, even though subsection 4C(b) makes it clear that the attorney general or the State need not actually be a member of the class he acts to represent, such membership would not be a disqualification. Thus where the State itself is a purchaser, the attorney general could represent its proprietarial interests and the interests of those of its citizens included in the class designated by the court.

14 See, e.G., Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314-15 (1950) 70 S.Ct. 652, 94 L.Ed. 865.

15 See Nolop v. Volpe, 333 F.Supp. 1364 (D.S.D. 1971).

16 Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, (1950) 70 S.Ct. 652, 94 L.Ed. 865; Hansberry v. Lee, 311 U.S. 32 (1940) 61 S.Ct. 115, 85 L.Ed. 22; Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356 (1921) 41 S.Ct. 338, 65 L.Ed. 673; Gonzales v. Cassidy, 474 F.2d 67 (5th Circ. 1973); Berland v. Mack, 48 F.R.D. 121 (S.D.N.Y. 1969); Miller, Problems of Giving Notice in Class Actions, 58 F.R.D. 313, 314-15 (1972); Comment, 62 Geo.L.J. 1123, 1169, and n. 256 (1974); Note, 87 Harv.L.Rev. 589, 590 (1974).

17 Boddic v. Connecticut, 401 U.S. 371, 377-78 (1971) 91 S.Ct. 780, 28 L.Ed.2d 113, conformed to 329 F.Supp. 844; Armstrong v. Manzo, 380 U.S. 545, 550 (1965) 85 S.Ct. 1187, 14 L.Ed.2d 62; Schroeder v. City of New York, 371 U.S. 208, 212-13 (1962) 83 S.Ct. 279, 9 L.Ed.2d 255, 89 A.L.R.2d 1398; Sniadack v. Family Finance Corp., 395 U.S. 337, 339 (Harlan, J. Concurring) 89 S.Ct. 1820, 23 L.Ed.2d 349.

18 See, e.g., Boshes v. General Motors Corp., 59 F.R.D. 589 (N.D. Ill. 1973); City of Philadelphia v. American Oil Co., 53 F.R.D. 45 (D.N.J. 1971).

19 As the Supreme Court put it in a pivotal case:

'Any other rule would enable the wrongdoer to profit by his wrongdoing at the expense of his victim. It would be an inducement to make wrongdoing so effective and complete in every case as to preclude any recovery, by rendering the measure of damages uncertain. Failure to apply it would mean that the more grievous the wrong done, the less likelihood there would be a recovery.

'The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created.'

Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251, 264-65 (1946) 66 S.Ct. 574, 90 L.Ed. 652, rehearing denied 66 S.Ct. 815, 327 U.S. 817, 90 L.Ed. 1040. See also Continental Ore Co. v. Union Carbide & Carbon Co. 370 U.S. 690, 697 (1962) 82 S.Ct. 1404, 8 L.Ed. 2d 777; Bordonaro Bros. Theatres, Inc. v. Paramount Pictures, Inc., 176 F.2d 594, 597 (2d Cir. 1949); Banana Distributors, Inc. v. United Fruit Co., 162 F.Supp. 32, 46 (S.D.N.Y. 1958), rev'd on other grounds, 269 F.2d 790 (2d Circ. 1959).

20 See e.g., Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 123-24 (1969) 89 S.Ct. 1562, 23 L.Ed.2d 129, on remand 418 F.2d 21, reversed 91 S.Ct. 795, 401 U.S. 321, 28 L.Ed.2d 77, rehearing denied 91 S.Ct. 1247, 401 U.S. 1015, 28 L.Ed.2d 552; Bigelow v. RKO Radio Pictures, Inc., supra note 19; Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555 (1931) 51 S.Ct. 248, 75 L.Ed. 544; Eastman Kodak Co. v. Southern Photo Materials Co. 273 U.S. 359 (1927) 47 S.Ct. 400, 71 L.Ed. 684.

21 In re Antibiotics Antitrust Actions, 33 F.Supp. 278, 281 (S.D.N.Y. 1971); see e.g., West Virginia v. Chas. Pfizer & Co., 440 F.2d 1079 (2d Cir.), cert. denied, 404 U.S. 871 (1971) 92 S.Ct. 81, 30 L.Ed.2d 115; Hartford Hospital v. Chas. Pfizer & Co., 1971 Trade Case #73,561 (S.D.N.Y. 1971).

22 Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251, 264 (1946) 66 S.Ct. 574, 90 L.Ed. 652, rehearing denied 66 S.Ct. 815, 327 U.S. 817, 90 L.Ed. 1040.

22a 51 S.Ct. 248, 75 L.Ed. 544.

23 The Seventh Circuit put the matter succinctly:

'To permit the defendants to contest liability with each claimant in a single, separate suit, would, in many cases give defendants an advantage which would be almost equivalent to closing the door of justice to all small claimants. This is what we think the class suit was to prevent.'

Hohmann v. Packard Instrument Co., 399 F.2d 711, 715, (7th Cir. 1968), quoting Weeks v. Bareco Oil Co., 125 F.2d 84, 90 (7th Circ. 1941); See Dickenson v. Burnham, 197 F.2d 973 (2d Cir.), cert. denied, 344 U.S. 875 (1952) 73 S.Ct. 169, 97 L.Ed. 678; In re Antibiotics Antitrust Actions, 333 F.Supp. 278, 282, 283, 289 (S.D.N.Y. 1971). See also 1974 Hearings at 29; 1975 Hearings at 17 (testimony of Messrs. Kauper and Halverson).

Statistical and sampling methods are, of course, commonly used in evidence in Federal courts in a variety of contexts. See Manual for Complex Litigation Sec. 2.712 (1973). See also Brown Shoe Co. v. United States, 370 U.S. 294, 339-343 (1962) 82 S.Ct. 1502, 8 L.Ed.2d 510; United States v. United Shoe Mach. Corp., 110 F.Supp. 295, 305-07 (D. Mass. 1953); Rosado v. Wyman, 322 F.Supp. 1173 (E.D.N.Y. 1970), aff'd 437 F.2d 631 (2d Cir. 1971) (citing numerous cases and other authorities 322 F.Supp. at 1180-81); Zippo Mfg. Co. v. Rogers Imports, Inc., 217 F.Supp. 670, 680-84 (S.D.N.Y. 1963).

24 See Bebchick v. Public Utilities Comm'n., 318 F.2d 187 (D.C. Cir.), cert. denied 373 U.S. 913 (1963) 83 S.Ct. 1304, 10 L.Ed.2d 414; Daar v. Yellow Cab Co., 67 Cal.2d 695, 433 F.2d 732, 63 Cal.Rptr. 224 (1967).

25 In re Antibiotics Antitrust Actions, 333 F.Supp. 278 (S.D.N.Y. 1971).

26 Hearings on S. 1284 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary, 94th Cong., 1st Sess., at 343 (1975).

27 Compare West Virginia v. Chas. Pfizer & Co., 440 F.2d 1079 (2d Cir. 1971), cert. denied 404 U.S. 871 (1971) 92 S.Ct. 81, 30 L.Ed.2d 115 (approving antitrust class action settlement embodying fluid class recovery concept with Eisen v. Carlisle & Jacqueline, 479 F.2d 1005, 1018 (2d Cir. 1973), vacated and remanded on other grounds, 417 U.S. 156 (1947) 94 S.Ct. 2140, 40 L.Ed.2d 732 (expressing due process doubts concerning what that court termed 'fluid class recovery').

28 The committee disapproves decisions such as City of Philadelphia v. American Oil Co., 53 F.R.D. 45 (D.N.H. 1971); Illinois Bell Tel. Co. v. Slattery, 102 F.2d 58 (7th Cir. 1939), and In re Hotel Telephone Charges, 500 F.2d 86 (9th Cir. 1975), in which, if allegations were accepted as true, defendants were permitted to retain millions of dollars in ill-gotten gains because of the apparent difficulties involved in manageability or in devising an equitable scheme for distribution of the overcharges to specific individual claimants. For added insight on the facts involved in the Illinois Bell outcome, see Newberg, Class Action Legislation, 9 Harv.J.Legis. 217, 231 (1972); Comment, 39 U.Chi.L.Rev. 448, 451, & n. 13 (1972); Note, 31 Md.L.Rev. 354, 361, & n. 50 (1971).

29 See Gottesman v. General Motors Corp., 414 F.2d 956 (2d Cir.), cert. denied, 403 U.S. 911 (1969) 91 S.Ct. 2008, 29 L.Ed.2d 689, rehearing denied 92 S.Ct. 29, 404 U.S. 876, 30 L.Ed.2d 125 (first holding that damages may be recovered under Sec. 7).

29a 48 S.Ct. 530, 72 L.Ed. 1005.

29b 421 U.S. 240, 44 L.Ed.2d 141.

(Note: 1. PORTIONS OF THE SENATE, HOUSE AND CONFERENCE REPORTS, WHICH ARE DUPLICATIVE OR ARE DEEMED TO BE UNNECESSARY TO THE INTERPRETATION OF THE LAWS, ARE OMITTED. OMITTED MATERIAL IS INDICATED BY FIVE ASTERISKS: *****. 2. TO RETRIEVE REPORTS ON A PUBLIC LAW, RUN A TOPIC FIELD SEARCH USING THE PUBLIC LAW NUMBER, e.g., TO(99-495))

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American Jurisprudence, Second Edition
Database updated August 2011

States, Territories, and Dependencies
Theresa L. Leming, J.D.

I. States
K. Liability; Actions and Proceedings
1. In General; Actions Brought by States
b. Standing

Topic Summary Correlation Table References

§ 91. Standing on behalf of citizens or "in parens patriae"—Necessity of interest apart from those of private parties; quasi-sovereign interest

West's Key Number Digest

West's Key Number Digest, States 190, 192

A state does not have parens patriae standing to sue on the basis of personal claims assigned to it by individuals, nor can there be standing if the primary thrust of the alleged wrong is an injury to a narrowly limited class of individuals and the harm to the state economy as a whole is insignificant by comparison.[1] To maintain a suit as parens patriae, a state must articulate an interest apart from the interests of particular private parties—that is, it must be more than a nominal party.[2] The state must express a quasi-sovereign interest that falls into one of two general categories: (1) the health and well-being, both physical and economic, of its residents in general, or (2) not being discriminatorily denied its rightful status within the federal system.[3]

A state's quasi-sovereign interests consist of a set of interests in the well-being of its populace that are sufficiently concrete to create an actual controversy between the state and the defendant.[4] Although the complexities of modern government make it impossible to catalog the economic interests that can be protected by a sovereign as parens patriae, the three factors that normally determine whether a quasi-sovereign interest is sufficiently important to permit standing are (1) the size of the segment of the population that has been adversely affected, (2) the magnitude of the harm inflicted, and (3) the practical ability of those injured to obtain complete relief without intervention by the sovereign.[5]

CUMULATIVE SUPPLEMENT

Cases:

State had no independent quasi-sovereign interest that could support standing to bring parens patriae action challenging "program integrity" regulation governing Legal Services Corporation (LSC); state's only discernible interest was in seeing to it that its citizens benefited from voluntary federal grants, which did not rise to level of actionable quasi-sovereign interest. Oregon v. Legal Services Corp., 552 F.3d 965 (9th Cir. 2009).

[END OF SUPPLEMENT]

[FN1] Com. of Pa., by Shapp v. Kleppe, 533 F.2d 668, 42 A.L.R. Fed. 1 (D.C. Cir. 1976).

[FN2] Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez, 458 U.S. 592, 102 S. Ct. 3260, 73 L. Ed. 2d 995 (1982); Estados Unidos Mexicanos v. DeCoster, 229 F.3d 332 (1st Cir. 2000).

[FN3] Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez, 458 U.S. 592, 102 S. Ct. 3260, 73 L. Ed. 2d 995 (1982); Estados Unidos Mexicanos v. DeCoster, 229 F.3d 332 (1st Cir. 2000); Connecticut v. Cahill, 217 F.3d 93 (2d Cir. 2000).

[FN4] Connecticut v. Cahill, 217 F.3d 93 (2d Cir. 2000).

[FN5] Com. of Puerto Rico ex rel. Quiros v. Alfred L. Snapp & Sons, Inc., 632 F.2d 365 (4th Cir. 1980), cert. granted, 454 U.S. 1079, 102 S. Ct. 631, 70 L. Ed. 2d 612 (1981) and judgment aff'd, 458 U.S. 592, 102 S. Ct. 3260, 73 L. Ed. 2d 995 (1982).

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States
By Eleanor L. Grossman, J.D., and Anne E. Melley, J.D., of the staff of the National Legal Research Group, Inc., Thomas Muskus, J.D., Carmela Pellegrino, J.D., Kimberly Simmons, J.D.

XI. Actions by and Against State
A. Capacity or Right to Sue

Topic Summary References Correlation Table

§ 530. Right of state to sue as "parens patriae"

West's Key Number Digest

West's Key Number Digest, States 190

The parens patriae theory creates a presumption that a government agency may represent the interests of all citizens in cases raising matters of sovereign interest.

The parens patriae theory creates a presumption that a government agency may represent the interests of all citizens in cases raising matters of sovereign interest.[1] "Parens patriae" means "parent of his or her country" and refers to the state regarded as a sovereign.[2] The common-law prerogative of a state to sue in "parens patriae" in the interests of humanity and for the prevention of injury to those who cannot protect themselves is inherent in the supreme power of every state.[3] However, the doctrine of parens patriae is merely a species of prudential standing, and does not create a boundless opportunity for governments to seek recovery for alleged wrongs against them or their residents.[4]

In order to maintain a parens patriae action, the state must articulate an interest apart from the interests of the particular private parties.[5] The state must be more than a nominal party.[6] If the state has no quasi-sovereign interest apart from the interests of private individuals, who can obtain complete relief through their own litigation, then no parens patriae standing exists.[7] A quasi-sovereign interest is a judicial construct that does not lend itself to simple or exact definition.[8] In order to express such an interest, the state must articulate an interest that affects a sufficiently substantial segment of its residents.[9] Although the articulation of such interests is a matter for case-by-case development, certain characteristics of interests fall into two categories.[10] First, a state has a quasi-sovereign interest in the health and well-being, both physical and economic, of its residents in general,[11] and second, a state has a quasi-sovereign interest in not being discriminatorily denied its rightful status within the federal system.[12] Further, the fact that litigants might not have the tenacity or fortitude to sue is relevant in determining whether private litigants can obtain complete relief through private litigation for purposes of parens patriae standing.[13] There is no numerical talisman to establish parens patriae standing, and thus, the raw number of individuals directly involved in alleged discrimination is not determinative.[14]

While a state does not have standing as parens patriae to bring an action against the federal government,[15] a state's quasi-sovereign interest in the health and well-being, physical and economic, of its residents, will support parens patriae standing to enforce federal statutes.[16]

CUMULATIVE SUPPLEMENT

Cases:

State's sovereign interest in ensuring that it receives an equitable share of interstate river's water is precisely the type of interest that state, as parens patriae, represents on behalf of its citizens. South Carolina v. North Carolina, 130 S. Ct. 854 (2010).

Commonwealth of Virginia had standing to challenge Patient Protection and Affordable Care Act provision requiring individuals to obtain minimum level of health insurance or pay penalty for failing to do so as violative of Virginia Health Care Freedom Act (VHCFA), notwithstanding contention that Commonwealth's action was barred by doctrine of parens patriae; Commonwealth's primary objective in prosecuting action was to defend VHCFA from conflicting effect of allegedly unconstitutional minimum essential coverage provision, and provision directly conflicted with Commonwealth's ability to enforce its duly enacted laws. U.S.C.A. Const. Art. 3, § 2, cl. 1; Patient Protection and Affordable Care Act, § 1 et seq., 42 U.S.C.A. § 18001 note; West's V.C.A. § 38.2–3430.1:1. Virginia ex rel. Cuccinelli v. Sebelius, 702 F. Supp. 2d 598 (E.D. Va. 2010).

[END OF SUPPLEMENT]

[FN1] U.S.—South Dakota v. Ubbelohde, 330 F.3d 1014, 56 Fed. R. Serv. 3d 271 (8th Cir. 2003), cert. denied, 72 U.S.L.W. 3451 (U.S. Apr. 19, 2004).

[FN2] U.S.—Steele v. Hamilton Cty. Community Mental Health Bd., 90 Ohio St. 3d 176, 2000 -Ohio-47, 736 N.E.2d 10 (2000).

[FN3] U.S.—People by Vacco v. Mid Hudson Medical Group, P.C., 877 F. Supp. 143, 8 A.D.D. 791, 31 Fed. R. Serv. 3d 818 (S.D. N.Y. 1995).

[FN4] U.S.—Service Employees Intern. Union Health and Welfare Fund v. Philip Morris Inc., 249 F.3d 1068 (D.C. Cir. 2001).

[FN5] U.S.—Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez, 458 U.S. 592, 102 S. Ct. 3260, 73 L. Ed. 2d 995 (1982).

[FN6] U.S.—Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez, 458 U.S. 592, 102 S. Ct. 3260, 73 L. Ed. 2d 995 (1982).

[FN7] U.S.—People v. Peter & John's Pump House, Inc., 914 F. Supp. 809 (N.D. N.Y. 1996).

[FN8] U.S.—People v. Peter & John's Pump House, Inc., 914 F. Supp. 809 (N.D. N.Y. 1996).

[FN9] U.S.—Broselow v. Fisher, 319 F.3d 605 (3d Cir. 2003).

[FN10] U.S.—Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez, 458 U.S. 592, 102 S. Ct. 3260, 73 L. Ed. 2d 995 (1982).

[FN11] U.S.—People v. Peter & John's Pump House, Inc., 914 F. Supp. 809 (N.D. N.Y. 1996).

[FN12] U.S.—Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez, 458 U.S. 592, 102 S. Ct. 3260, 73 L. Ed. 2d 995 (1982).

[FN13] U.S.—People v. Peter & John's Pump House, Inc., 914 F. Supp. 809 (N.D. N.Y. 1996).

[FN14] U.S.—People by Vacco v. Mid Hudson Medical Group, P.C., 877 F. Supp. 143, 8 A.D.D. 791, 31 Fed. R. Serv. 3d 818 (S.D. N.Y. 1995).

[FN15] U.S.—Graham v. Schweiker, 545 F. Supp. 625 (S.D. Fla. 1982).

[FN16] U.S.—City of New York v. Heckler, 578 F. Supp. 1109 (E.D. N.Y. 1984), judgment aff'd, 742 F.2d 729 (2d Cir. 1984), judgment aff'd, 476 U.S. 467, 106 S. Ct. 2022, 90 L. Ed. 2d 462 (1986).

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Only the Westlaw citation is currently available.

United States District Court,
N.D. Illinois,
Eastern Division.
State of ILLINOIS, Plaintiff,
v.
AU OPTRONICS CORP., et al., Defendants.

No. 10–cv–5720.
June 6, 2011.

Background: State of Illinois filed state court suit against manufacturer of computer displays alleging it had engaged in conspiracy to fix prices of thin film transistor liquid crystal display (LCD) panels in violation of Illinois Antitrust Act (IAA). After manufacturer removed action pursuant to Class Action Fairness Act (CAFA), State moved to remand.

Holdings: The District Court, Robert M. Dow, Jr., J., held that:
(1) State was "real party in interest," and thus, not a "citizen" for CAFA jurisdictional purposes;
(2) suit was not a "class action" under CAFA; and
(3) suit was not a "mass action" under CAFA.

Motion granted.

West Headnotes

[1] Federal Courts 170B 0

170B Federal Courts
Courts are to interpret the removal statute narrowly. 28 U.S.C.A. § 1441(a).

[2] Federal Courts 170B 0

170B Federal Courts
Any doubts that persist regarding the propriety of removal are to be resolved in favor of plaintiff's choice of forum in the state courts. 28 U.S.C.A. § 1441(a).

[3] Removal of Cases 334 0

334 Removal of Cases
For covered class actions, Class Action Fairness Act (CAFA) abdicates the complete diversity rule that generally applies in federal diversity cases. 28 U.S.C.A. § 1332(d)(2).

[4] Removal of Cases 334 0

334 Removal of Cases
Class Action Fairness Act (CAFA) does not alter the established legal rule that a proponent of federal jurisdiction bears the burden of establishing removal jurisdiction, nor does CAFA displace the principle that a plaintiff is the master of its complaint and may choose to structure its claims to remain outside of CAFA's grant of jurisdiction. 28 U.S.C.A. §§ 1332(d)(2), 1441(a).

[5] Removal of Cases 334 0

334 Removal of Cases
Whether minimal diversity exists under Class Action Fairness Act (CAFA), for purposes of establishing federal court jurisdiction, hinges on the identity of the real party in interest. 28 U.S.C.A. §§ 1332(d)(2), 1441(a).

[6] Federal Courts 170B 0

170B Federal Courts
A court determining whether it has diversity jurisdiction over an action must disregard nominal or formal parties and rest jurisdiction only upon the citizenship of real parties to the controversy. 28 U.S.C.A. § 1441(a).

[7] Federal Courts 170B 0

170B Federal Courts
A "real party in interest," for purposes of diversity jurisdiction, is a party that has a substantial stake in the case. 28 U.S.C.A. § 1441(a).

[8] Federal Courts 170B 0

170B Federal Courts

In determining whether a named plaintiff is a real party in interest, for purposes of establishing diversity jurisdiction, court must examine essential nature and effect of proceeding, as it appears from entire record. 28 U.S.C.A. § 1441(a).

[9] Federal Courts 170B 0

170B Federal Courts

Under diversity jurisdiction analysis, if a court determines on the basis of a complaint that named plaintiff is merely a nominal party, then court should look past complaint to determine if any unnamed plaintiffs are the real parties in interest. 28 U.S.C.A. § 1441(a).

[10] Federal Courts 170B 0

170B Federal Courts

A court may not consider a plaintiff-State a “citizen” for diversity jurisdiction purposes if the State is a real party in interest. 28 U.S.C.A. § 1441(a).

[11] Federal Courts 170B 0

170B Federal Courts

A State is a “real party in interest,” under diversity jurisdiction analysis, when it articulates an interest apart from the interests of particular private parties; State must be more than a nominal party and must express a quasi-sovereign interest. 28 U.S.C.A. § 1441(a).

[12] Federal Courts 170B 0

170B Federal Courts

Advancing a quasi-sovereign interest is enough to make a State a “real party in interest” for purposes of diversity jurisdiction analysis. 28 U.S.C.A. § 1441(a).

[13] States 360 0

360 States

An action brought by a State advances a “quasi-sovereign interest” so as to allow State to sue as parens patriae on behalf of its citizens as real party in interest, when action concerns a substantial segment of the State's population.

[14] States 360 0

360 States

One factor court uses in determining whether an alleged injury to health and welfare of its citizens suffices to give a State standing to sue as parens patriae is whether the injury is one that the State, if it could, would likely attempt to address through its sovereign lawmaking powers.

[15] States 360 0

360 States

A State that brings a suit in which it asserts not a quasi-sovereign interest but exclusively the private interests of a small subset of the State's population is not a “real party in interest”; rather, it is only a nominal party.

[16] States 360 0

360 States

In State's action against manufacturer of computer displays for conspiracy to fix prices of thin film transistor liquid crystal display (LCD) panels, in violation of Illinois Antitrust Act (IAA), which had been removed from Illinois state court pursuant to Class Action Fairness Act (CAFA), State was “real party in interest,” and thus, not a “citizen” for CAFA jurisdictional purposes, and therefore action would be remanded to Illinois state court, where state had quasi-sovereign interest in securing an honest marketplace, which was a parens patriae action at common law, and parsing of State's separate claims for broad injunctive relief and damages for a particular subset of its citizens, in order to establish diversity jurisdiction, would defeat purpose of IAA which was to permit Attorney General to bring parens patriae actions to recover damages for antitrust violations. 28 U.S.C.A. §§ 1441(a), 1332(d)(2); 740

ILCS 10/7.

[17] Removal of Cases 334 0

334 Removal of Cases

State's parens patriae suit against manufacturer of computer displays, for conspiracy to fix prices of thin film transistor liquid crystal display (LCD) panels, in violation of Illinois Antitrust Act (IAA), which had been removed from Illinois state court pursuant to Class Action Fairness Act (CAFA), was not a "class action," under CAFA, but rather a separate and distinct procedural vehicle, and thus, CAFA did not apply, and action would be remanded; class action required numerosity, typicality, and commonality, whereas State's parens patriae suit imposed no such constraints, and while class actions imposed rigorous procedural safeguards to protect absent class members, safeguards in State's suit were limited only to due process and democratic process. 28 U.S.C.A. § 1332(d)(1)(B); 740 ILCS 10/7(2); Fed.Rules Civ.Proc.Rule 23, 28 U.S.C.A.

[18] Removal of Cases 334 0

334 Removal of Cases

State's parens patriae suit against manufacturer of computer displays, for conspiracy to fix prices of thin film transistor liquid crystal display (LCD) panels, in violation of Illinois Antitrust Act (IAA), which had been removed from Illinois state court pursuant to Class Action Fairness Act (CAFA), was not a "mass action" under CAFA, so as to confer federal court jurisdiction, since State was real party in interest suing to protect and vindicate the rights of the public in general; action did not meet CAFA's numerosity requirement of 100 or more named plaintiffs, nor did it meet CAFA's $75,000 jurisdictional threshold requirement for mass actions, and suit did not fall within CAFA's jurisdictional exception for cases brought on behalf of the general public. 28 U.S.C.A. §§ 1332(d)(11)(A), 1332(a), 1332(d)(11)(B)(ii)(III), 1332(d)(11)(13)(i), 1332(d)(11)(13)(I).

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Caesar Kinnier Lastimosa, Diana Lawrence Geseking, Kirk Christopher Jenkins, Sedgwick, Detert, Moran & Arnold LLP, Jacob Douglas Smith, Michael Peter Conway, Grippo & Elden LLC, Marion B. Adler, Rachlis Durham Duff Adler & Peel, LLC, Kevin Bernard Dreher, Morgan, Lewis & Bockius LLP, Eugene E. Gozdecki, Jeffery Michael Heftman, Richard A. Delgiudice, Gozbecki Del Giudice Americus & Farkas LLP, Chicago, IL, Carl Lawrence Blumenstein, Christopher A. Nedeau, Nossaman LLP, Stephen P. Freccero, Morrison and Foerster, San Francisco, CA, Steven F. Cherry, Wilmer Cutler Pickering Hale and Dorr LLP, Kristen J. McAhren, White & Case LLP, Washington, DC, Angela D. Daker, White & Case, Miami, FL, for Defendants.

MEMORANDUM OPINION AND ORDER

ROBERT M. DOW, JR., District Judge.

***1** On August 10, 2010, the State of Illinois ("the State" or "Plaintiff"), through its Attorney General Lisa Madigan, filed a lawsuit against AU Optronics Corporation, *et al.* ("Defendants") in the Circuit Court of Cook County, Illinois, pursuant to the Illinois Antitrust Act ("IAA"). Plaintiff's complaint alleges that Defendants engaged in a conspiracy to fix prices of thin film transistor liquid crystal display ("LCD") panels between 1998 and 2006. Plaintiff seeks civil penalties, injunctive relief, declaratory relief, and damages based on alleged overcharges that the State and individual Illinois residents paid for LCD products.

Defendants removed the case to this Court, invoking its diversity jurisdiction under the Class Action Fairness Act ("CAFA").FN1 Pending before the Court is Plaintiff's motion to remand the case to the Circuit Court of Cook County [28]. For the reasons stated below, the Court grants Plaintiff's motion.

I. Legal Standard

[1][2] In general, an action filed in state court may be removed to federal court only if the action originally could have been brought in federal court. 28 U.S.C. § 1441(a). Courts are to interpret the removal statute narrowly. *Schur v. L.A. Weight Loss Centers, Inc.,* 577 F.3d 752, 758 (7th Cir.2009). Any doubts that persist regarding the propriety of removal are to be resolved in favor of the plaintiff's choice of forum in the state courts. *Id.*

[3] CAFA enacts special rules governing removal of class actions. Under CAFA, a defendant may remove a class action to federal district court so long as the case satisfies the statute's special diversity and procedural requirements. First, CAFA requires minimal diversity of citizenship among parties to the action. 28 U.S.C. § 1332(d)(2). Thus, for covered class actions, CAFA abdicates the complete diversity rule that generally applies in federal diversity cases. See *Abrego Abrego v. The Dow Chemical Co.,* 443 F.3d 676, 680, 684 (9th Cir.2006). Second, an action removable under CAFA must satisfy the statute's definition of a "class action" or a "mass action." CAFA defines a "class action" as "any civil action filed under rule 23 of the Federal Rules of Civil Procedure or similar State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action." 28 U.S.C. § 1332(d)(1)(B). CAFA defines a "mass action" as "any civil action * * * in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact, except that jurisdiction shall exist only over those plaintiffs whose claims in a mass action satisfy the jurisdictional amount requirements under [28 U.S.C. § 1332(a)]." 28 U.S.C. § 1332(d)(11)(B)(i).

[4] The Seventh Circuit has explained that CAFA did not alter the established legal rule that the proponent of federal jurisdiction bears the burden of establishing removal jurisdiction. *Brill v. Countrywide Home Loans, Inc.,* 427 F.3d 446, 448 (7th Cir.2005). Nor did CAFA displace the principle that a plaintiff is the master of its complaint and may choose to structure its claims to "remain outside of CAFA's grant of jurisdiction." *Anderson v. Bayer Corp.,* 610 F.3d 390, 393 (7th Cir.2010).

II. Analysis

***2** Plaintiff has filed a motion to remand this action to state court on the ground that this Court lacks subject matter jurisdiction under CAFA. [28.] Plaintiff's motion presents three questions: (1) whether this case satisfies the minimal diversity requirement necessary to create federal subject matter jurisdiction under CAFA, (2) whether the case constitutes a "class action" under CAFA, and (3) whether the case constitutes a "mass action" under CAFA.

A. Whether Minimal Diversity Exists Between the Parties so as to Establish Jurisdiction in this Court Under CAFA

[5] Whether minimal diversity exists under CAFA hinges on the identity of the real party in interest. See *Navarro Sav. Ass'n v. Lee,* 446 U.S. 458, 460–61, 100 S.Ct. 1779, 64 L.Ed.2d 425 (1980). Accordingly, the first question presented by Plaintiff's remand motion is whether the State of Illinois is a real party in interest. If it is, then the action fails to comport with the minimal diversity jurisdictional requirement of CAFA. However, if individual Illinois residents who would benefit from the damages claims brought by the State are the real parties in interest, they would create the minimal diversity sufficient to vest jurisdiction in this Court.

[6] The Supreme Court long ago established that, for diversity purposes, a "citiz en" must be a "real and substantial part[y] to the controversy." *Navarro,* 446 U.S. at 460–61 (1980) (citing *McNutt v. Bland,* 2 How. 9, 15, 11 L.Ed. 159 (1844); *Marshall v. Baltimore & Ohio R. Co.,* 16 How. 314, 328–29, 14 L.Ed. 953 (1854); *Coal Co. v. Blatchford,* 11 Wall. 172, 177, 20 L.Ed. 179 (1871)). In other words, a court determining whether it has diversity jurisdiction over an action "must *disregard*

nominal or formal parties and rest jurisdiction only upon the citizenship of real parties to the controversy." *Id.* (emphasis added).

[7][8][9] Courts have defined a real party in interest as a party that has a substantial stake in the case. See *Illinois v. SDS West Corp.,* 640 F.Supp.2d 1047, 1052 (C.D.Ill.2009) (citing *Wisconsin v. Abbott Labs.,* 341 F.Supp.2d 1057, 1061 (W.D.Wis.2004)). In determining whether a named plaintiff is a real party in interest, a court must examine the "essential nature and effect of the proceeding, as it appears from the entire record." *In re New York,* 256 U.S. 490, 500, 41 S.Ct. 588, 65 L.Ed. 1057 (1921) (citing cases); see also *Nuclear Eng'g Co. v. Scott,* 660 F.2d 241, 250 (7th Cir.1981) (citing *Ford Motor Co. v. Dep't of Treasury,* 323 U.S. 459, 464, 65 S.Ct. 347, 89 L.Ed. 389 (1945) (overruled on other grounds by *Lapides v. Board of Regents of Univ. Sys. of Georgia,* 535 U.S. 613, 122 S.Ct. 1640, 152 L.Ed.2d 806 (2002))). If a court determines on the basis of the complaint that the named plaintiff is merely a nominal party, then the court should look past the complaint to determine if any unnamed plaintiffs are the real parties in interest. See *Navarro,* 446 U.S. at 461.

[10][11][12][13] A court may not consider a plaintiff-State a "citizen" for diversity jurisdiction purposes if the State is a real party in interest. *Nuclear Eng'g Co.,* 660 F.2d at 250 (citing *Ford,* 323 U.S. at 464). A State is a real party in interest when it "articulate[s] *an interest apart from the interests of particular private parties, i.e.*, the State must be *more than a nominal party.* The State must express a quasi-sovereign interest." *Illinois v. Life of Mid–America Ins. Co.,* 805 F.2d 763, 766 (7th Cir.1986) (quoting *Alfred L. Snapp & Son, Inc. v. Puerto Rico,* 458 U.S. 592, 607, 102 S.Ct. 3260, 73 L.Ed.2d 995 (1982)) (emphasis added); see also *SDS West Corp.,* 640 F.Supp.2d at 1050 (holding that when a State sues on behalf of its residents without a sovereign or quasi-sovereign interest, it is only a nominal party and thus not the real party in interest). Advancing a quasi-sovereign interest is enough to make a State a real party in interest. See *Hood ex. rel Mississippi v. Microsoft Corp.,* 428 F.Supp.2d 537, 542 (S.D.Miss.2006); *Alabama ex rel. Galanos v. Star Service & Petroleum Co., Inc.,* 616 F.Supp. 429, 431 (D.C.Ala.1985); *New York ex rel. Abrams v. General Motors Corp.,* 547 F.Supp. 703, 706 n. 5 (S.D.N.Y.1982). Similarly, advancing a sovereign or quasi-sovereign interest allows a State to sue as *parens patriae* on behalf of its citizens. See *SDS West Corp.,* 640 F.Supp.2d at 1050 (holding that a State must articulate a quasi-sovereign interest in order to have *parens patriae* standing).

***3** [14] An action brought by a State advances a quasi-sovereign interest (such that the State is the real party in interest) when the action concerns a "substantial segment of the [State's] population." *SDS West Corp.* 640 F.Supp.2d at 1050 (quoting *Snapp,* 458 U.S. at 607). The Supreme Court has ruled that "a State has a quasi-sovereign interest in the health and well-being—both physical and economic—of its residents in general." *Snapp,* 458 U.S. at 607. The Court suggested in *Snapp* that "[o]ne helpful indication in determining whether an alleged injury to the health and welfare of its citizens suffices to give the State standing to sue as *parens patriae* is whether the injury is one that the State, if it could, would likely attempt to address through its sovereign lawmaking powers." *Id.* For example, where a State legislature enacts a statute that seeks to "secur[e] an honest marketplace" for State residents, then the statute expresses a quasisovereign interest and grants the State standing to bring a *parens patriae* suit. *SDS West Corp.,* 640 F.Supp.2d at 1050 (holding that "securing an honest marketplace" is "a well established quasi-sovereign interest").

[15] A State that brings a suit in which it asserts not a quasi-sovereign interest but *exclusively* the private interests of a small subset of the State's population is not a real party in interest; rather, it is only a nominal party. *Snapp,* 458 U.S. at 601–02. "[A] State may, for a variety of reasons, attempt to

pursue the interests of a private party, and pursue those interests *only* for the sake of the real party in interest. Interests of private parties are obviously not in themselves sovereign interests, and they do not become such simply by virtue of the State's aiding in their achievement. In such situations, the State is no more than a nominal party." *Id.* (emphasis added)). Because the State is a nominal party in that circumstance, a court may look beyond the complaint to determine whether certain unnamed plaintiffs (rather than the State) are the real parties in interest. See *Missouri ex rel. Koster v. Portfolio Recovery Assocs., Inc.,* 686 F.Supp.2d 942, 945–46 (E.D.Mo.2010).

The analysis is somewhat complicated when a State brings an action, like the one at bar, that seeks *both* broad injunctive relief *and* damages for a particular subset of citizens. Defendants urge the Court to adopt the Fifth Circuit rule (also followed by one district court in the Third Circuit) that a court dissect the claims in the complaint and find jurisdiction over a case in which the unnamed plaintiffs on whose behalf a State asserts damages are minimally diverse from the defendant under CAFA, even if the State is indisputably a real party in interest with respect to other claims. See *Louisiana ex rel. Caldwell v. Allstate Ins. Co.,* 536 F.3d 418 (5th Cir.2008); *West Virginia ex rel. McGraw v. Comcast Corp.,* 705 F.Supp.2d 441 (E.D.Pa.2010); see also *West Virginia ex rel. McGraw v. CVS Pharmacy, Inc.,* 2011 WL 1902678, at *10 (4th Cir. May 20, 2011) (Gilman, J., dissenting).[FN2]

***4** *Allstate* involved an antitrust parens patriae action in which the State attorney general sought damages for residents as well as broad-based injunctive relief and forfeiture. *Allstate,* 536 F.3d at 422–23. The defendant removed the case to federal court, and the district court denied the plaintiff's motion to remand. *Id.* at 423–24. Affirming the district court's decision, the Fifth Circuit opined that "defendants may pierce the pleadings to show that the * * * claim has been *fraudulently pleaded* to prevent removal." *Id.* at 424–25. The court first stated that because the State did not object to the district court's decision to pierce the pleadings, that issue was waived. *Id.* at 425. The court next observed that the State had statutory authority to bring *parens patriae* antitrust actions, but explained that:

> The parties vigorously debate whether the Attorney General's *parens patriae* authority is extensive enough to allow the State to sue for treble damages in a representative capacity under state law. We need not address that issue. Even assuming *arguendo* that the Attorney General has standing to bring such a representative action, the narrow issue before this court is who are the real parties in interest: the individual policyholders or the State. We conclude that as far as the State's request for treble damages is concerned, the policyholders are the real parties in interest.

Id. at 429. Notably, the court did not address the fact that the State presumably had a sovereign or quasi-sovereign interest in the injunctive relief and forfeiture claims. In other words, the court did not expressly determine whether the State was a real party in interest or only a nominal party in the action as a whole. Nor did the court determine that the State had fraudulently pleaded the complaint to prevent federal jurisdiction. Rather, the court simply looked beyond the complaint and determined that unnamed plaintiffs were real parties in interest as to the suit's claims for money damages. *Id.* at 429. The court determined that these unnamed plaintiffs created diversity and that the district court therefore had jurisdiction over the case. *Id.* at 430.

Relying on *Allstate,* Defendants argue that, although the State here may be a real party in interest with respect to the enforcement-related claims in the complaint, it is not a real party in interest with respect to the money damages claims asserted for the benefit of the overcharged individuals. Defendants further argue that because CAFA requires only *minimal* and not *complete* diversity, this Court has jurisdiction by virtue of the unnamed plaintiffs who are real parties in interest as to the damages claims.

The Supreme Court, Seventh Circuit, and district courts in this and other circuits have taken a different approach to assessing real-party-in-interest questions, pursuant to which courts examine the *State's interest in the action as a whole* in deciding real-party-in-interest questions. See *Ford Motor Co.,* 323 U.S. at 463; *In re New York,* 256 U.S. at 500; *Nuclear Eng'g Co.,* 660 F.2d at 250; *SDS West,* 640 F.Supp.2d at 1052 (acknowledging that although a minority of courts have divided complaints according to the relief sought in deciding real-party-in-interest issues, "[m]ost have rejected [that approach] and viewed the complaint as a whole," and noting that "Illinois law appears to be in accord with the latter view" (citing *People ex rel. Hartigan v. Lann,* 225 Ill.App.3d 236, 167 Ill.Dec. 252, 587 N.E.2d 521 (1992)); *Abbott Labs.,* 341 F.Supp.2d at 1062 (rejecting defendant's argument that the court should split the State's complaint into two categories—claims made on behalf of private entities and claims made on behalf of the State—and instead holding that "most courts analyze real party in interest questions by examining the state's interest in a lawsuit as a whole")); *Illinois ex rel. Scott v. Hunt Int'l Resources Corp.,* 481 F.Supp. 71, 74 (N.D.Ill.1979) (holding that a court should look past a named party that does not have a pecuniary interest in the case to unnamed parties only in cases that "involve the collusive naming of a representative * * * to create jurisdiction * * *. On the other hand, the good faith naming of a representative that defeats federal jurisdiction has long been allowed" (citations omitted)).FN3

***5** Under that approach, viewing a State's complaint as a whole, a court seeking to identify the real party in interest must ask "not whether the state alone will benefit, but whether the state has 'a substantial stake in the outcome of the case.' " *SDS West Corp.,* 640 F.Supp.2d at 1052 (quoting *Abbott Labs.,* 341 F.Supp.2d at 1062)). If the State seeks relief that affects the economic well-being of its citizens broadly, then the State is the real party in interest, and the court need not look to unnamed parties to determine if some of the claims asserted also would benefit them. See *Kansas ex rel. Stovall v. Home Cable, Inc.,* 35 F.Supp.2d 783, 785–86 (D.Kan.1998) (holding that "[t]he fact that one of the remedies sought by the State of Kansas is restitution to the allegedly aggrieved Kansas consumers does not transform the State of Kansas into a 'citizen' for purposes of establishing diversity jurisdiction"); *Hunt Int'l,* 481 F.Supp. at 74 (holding that because there was "absolutely no indication that the Attorney General sought to bring this class suit in order to defeat diversity jurisdiction * * * [t]his court will not disregard the presence of the Attorney General, the only plaintiff presently before the court"); *Lann,* 167 Ill.Dec. 252, 587 N.E.2d at 524–25 (holding that the State was a real party in interest when the Attorney General filed suit under the Illinois Consumer Fraud Act on behalf of residents who were specifically aggrieved by violations of the Act because the Attorney General decides whether to bring the litigation and maintains control of it in her role as protector of the public, and not as personal representative of the consumers for whom she seeks restitution). As many courts have held, a State is not automatically rendered a nominal party when it seeks *both* broad injunctive relief *and* monetary damages for injured residents, but rather may be found to be a real party in interest so long as the quasi-sovereign interest it asserts meets the "substantial stake" test. See *Home Cable Inc.,* 35 F.Supp.2d at 785–86. To hold otherwise would be to prevent the plaintiff from acting as the master of the complaint and choosing its forum. See *Tanoh v. Dow Chem. Co.,* 561 F.3d 945, 953 (9th Cir.2009) (restating the "well-established rule that plaintiffs, as masters of their complaint, may choose their forum by selecting state over federal court"); accord *Anderson,* 610 F.3d at 393 (agreeing with *Tanoh* in holding that a plaintiff, as master of the complaint, may plead around CAFA requirements to determine the forum); *cf. CVS Pharmacy,* 2011 WL 1902678, at *7 (stressing that "CAFA is also sensitive to deeply-rooted principles of federalism, reserving to the States primarily local matters" and that "[c]omity demands that we step most carefully before 'snatch[ing] case which a State has brought from the courts of that State, unless some clear rule demands it' " (quoting *Franchise Tax Bd. v. Constr. Laborers Vacation Trust,* 463 U.S. 1, 21 n. 22, 103 S.Ct. 2841, 77 L.Ed.2d 420 (1983)).

***6** A number of courts have expressly taken issue with the *Allstate* decision (followed by *Comcast*) on the ground that it disregarded the State's ostensible quasi-sovereign interest in at least some of the claims and "pierced" the pleadings to find that unnamed parties were real parties in interest. See *Portfolio Recovery Assocs., Inc.,* 686 F.Supp.2d at 945–46 (stating that the legal analysis in *Allstate* is unpersuasive because it (1) "is counter to the Supreme Court's directive that removal statutes are to be 'strictly construed,' especially those that undermine the authority of the state" and (2) "pierced" the plaintiff's pleading although "it does not appear defendants had alleged that the plaintiffs used fraud to destroy federal jurisdiction and despite the fact that the Fifth Circuit acknowledged that the State * * * had the authority to bring *parens patriae* antitrust actions" (citations omitted)); *Virginia v. SupportKids Servs., Inc.,* 2010 WL 1381420, at *2 n. 2 (E.D.Va. Mar.30, 2010) (stating that *Allstate* was mistaken for the "glaring reason[ ]" that "the court in that case actually found that Louisiana was a real party in interest"). Most recently, a court in the Northern District of California granted plaintiff-States Washington's and California's motions to remand their suits against AU Optronics for overcharging for LCD panels after concluding that the claim-by-claim approach taken in *Allstate* and *Comcast* was unsupported by the language or legislative history of CAFA. *In re: TFT–LCD (Flat Panel) Antitrust Litigation,* No. 07–cv–1827 SI, 2011 WL 560593, at *3 (N.D.Ca. Feb.15, 2011) (stating that the court was "unpersuaded by defendants' argument that simply because CAFA was intended to broaden federal jurisdiction over class actions, federal courts are required to deviate from the traditional 'whole complaint' analysis when evaluating whether a State is the real party in interest in a *parens patriae* case" (citing *SDS West Corp.,* 640 F.Supp. at 1052)).

[16] Here, Plaintiff argues that it has a substantial stake in the outcome of this case. Plaintiff contends that the treble damages for overcharges that customers and the State paid, as well ascivil penalties, declaratory relief, and injunctive relief that it seeks would secure a more honest marketplace and positively affect a substantial segment of the population. Plaintiff further argues that its sovereign interest in this type of action was recognized by the legislature when it designed the IAA to permit the Attorney General to bring *parens patriae* actions to recover damages for antitrust violations. See 740 ILCS 10/7. By virtue of the legislature's grant of express authority, Plaintiff argues, it has a considerable interest in the outcome of this lawsuit. Plaintiff further argues that it has a substantial interest in advancing its sovereign interest by enforcing its own laws—namely, the IAA. Finally, Plaintiff contends that its interest is neither diminished nor rendered nominal because the action in part seeks monetary relief for those Illinois residents who paid overcharges. Plaintiff contends that the damages component of the lawsuit could benefit Illinois's residents as a whole given that payment of damages against those individuals may have a deterrent effect.

***7** In sum, viewing as a whole the nature and effect of the suit, Plaintiff argues that the potential of the suit to impact the Illinois populace writ large means that (1) Plaintiff is a real party in interest, (2) the Court thus need not look beyond the complaint to determine whether unnamed plaintiffs have a more significant stake in the outcome of the litigation, and (3) the Court lacks diversity jurisdiction under CAFA and should remand the case to state court. See *Hunt Int'l,* 481 F.Supp. at 74 (remanding an action in which the Attorney General sought injunctive and monetary relief despite the fact that unnamed defrauded residents also stood to benefit from the suit); see also *Lann,* 167 Ill.Dec. 252, 587 N.E.2d at 524 (holding that injured consumers for whom the State sought restitution were not real parties in the State's *parens patriae* suit).

Defendants raise two arguments in response, both of which track *Allstate* in urging the Court to dissect the claims of the complaint and consider the relative import of the various claims asserted within it. First, Defendants argue that the State does not have a quasi-sovereign interest in recovering damages on behalf of a specific subset of residents. Therefore, Defendants contend, the State is not the real party of interest with respect to the money damages claims; rather, the injured residents are. Given that the injured residents are the real parties in interest, Defendants assert that federal diversity jurisdiction under CAFA exists, and the motion to remand should be denied. Second, Defendants contend that the amount of damages sought for private individuals in the State's damages claims is greater than the amount sought (pursuant to a statutory cap) in the State's claim for civil penalties. Defendants submit that the claim for injunctive relief thus "has little significance," because the State does not allege that the conspiracy to overcharge customers is ongoing. [50, at 5.] Defendants suggest that these facts belie the true nature of this action as one brought for the benefit of a select class of Illinois residents, thus making those residents rather than the State the real parties in interest.[FN4]

After careful consideration of the parties' respective positions in light of the pertinent authority, the Court respectfully rejects Defendants' arguments and concludes that it should look to the complaint as a whole to determine the real party in interest. See *Ford Motor Co.,* 323 U.S. at 463; *In re New York,* 256 U.S. at 500; *Nuclear Eng'g Co.,* 660 F.2d at 250; *SDS West,* 640 F.Supp.2d at 1052. However, the Court adds that even if it parsed the claims separately, the result would be the same in this instance because Plaintiff has a quasi-sovereign interest in both its claims for injunctive relief and penalties and its damages claims, which seek recovery on behalf of a wide range of consumers and aim to deter future antitrust conduct by corporations in Illinois. See *In re TFT–LCD (Flat Panel) Antitrust Litig.,* 2011 WL 560593, at *5 (contrasting cases in which States sued only on behalf of limited groups of private parties).

8** The Court's conclusion is bolstered by the express purpose of the IAA, which is "to promote the unhampered growth of commerce and industry throughout Illinois." 740 ILCS 10/2. This goal is consistent with that of *parens patriae* actions at common law—namely, to allow the State to serve as the "watchdog of its quasi-sovereign interests." ***Pennsylvania v. Mid– Atlantic Toyota Distributors, Inc., **704 F. 2d 125, 129 n. 8 (4th Cir. 1983)** (internal quotation marks and citations omitted). The IAA provides that:

> The Attorney General may also bring an action in the name of this State, as parens patriae on behalf of persons residing in this State, to recover the damages under this subsection or any comparable federal law. The powers granted in this Section are in addition to and not in derogation of the common law powers of the Attorney General to act as parens patriae.

740 ILCS 10/7. The IAA thus specifically authorizes the Attorney General to bring suit for damages in the public interest *on behalf of those individuals affected* by antitrust violations *in order to protect* the economic health and well-being of *the State.* See *Lann,* 167 Ill.Dec. 252, 587 N.E.2d at 524 (interpreting the Illinois consumer fraud act as imparting a duty on the attorney general to enforce the law, which was designed to protect the public, even as it sought damages for transactions involving individual consumers, and holding that "[a]lthough restitution may benefit aggrieved consumers * * * the legislature did not intend the individual consumers to be treated as parties to the action for any purposes even under a liberal construction of the Act"); see also *SDS West Corp.,* 640 F.Supp.2d at 1051 (finding that "[a]lthough the number of persons directly harmed [and on whose behalf the State sought damages under the state consumer fraud act] may be small relative to

Illinois's population, the indirect benefits of barring unscrupulous companies from soliciting further business accrues to the population at large. Indeed, that is why securing an honest marketplace is a quasi-sovereign interest. Thus, Illinois has a quasi-sovereign interest in this litigation"). Indeed, some courts have suggested that if a statute confers on the State alone authorization to bring suit, then the State is a real party in interest. *Brooks v. Tyger Const. Co., Inc.,* 1990 WL 488977, at *2 (M.D.N.C. Apr.30, 1990). Here, given that the IAA limits standing for aggregated, indirect purchaser claims to the Attorney General, it would be contrary to the statutory language and purpose to hold that the Attorney General, representing the State, is not the real party in interest.[FN5]

In view of the State's quasi-sovereign interest in bringing this action, the State is a real party in interest in this case. The State is not rendered a nominal party by virtue of the damages claims that it asserts on behalf of particular Illinois residents. See, *e.g., In re TFT–LCD (Flat Panel) Antitrust Litig.,* 2011 WL 560593, at *5; *Lann,* 167 Ill.Dec. 252, 587 N.E.2d at 524. As a State, Plaintiff is not a citizen for diversity purposes. Accordingly, the minimal diversity jurisdictional requirements of CAFA have not been met.[FN6]

B. Whether the Action Is a "Class Action" the Term Is Defined in CAFA

***9** [17] Plaintiff also argues that remand is warranted because the case is not a "class action," as that term is defined in CAFA. CAFA provides that "the term 'class action' means any civil action filed under rule 23 of the Federal Rules of Civil Procedure or similar State statute or rule of judicial procedure authorizing an action to be brought by 1 or more representative persons as a class action." 28 U.S.C. § 1332(d)(1)(B). The Fourth Circuit recently held that a state statute or rule is similar to Rule 23 if, "at a minimum, [it] provide[s] a procedure by which a member of a class whose claim is typical of all members of the class can bring an action not only on his own behalf but also on behalf of all others in the class, such that it would not be unfair to bind all class members to the judgment entered for or against the representative party." *West Virginia ex rel. McGraw v. CVS Pharmacy, Inc.,* 2011 WL 1902678, at *4 (4th Cir. May 20, 2011).

The parties agree that this lawsuit was not filed as a class action under Rule 23, but rather as a *parens patriae* action under the IAA. The IAA provides in pertinent part that "[t]he Attorney General may * * * bring an action in the name of this State, as parens patriae on behalf of persons residing in this State, to recover the damages under this subsection or any comparable federal law." 740 ILCS 10/7(2). In the same provision, the IAA states that "no person shall be authorized to maintain a class action in any court of this State for indirect purchasers asserting claims under this Act, with the sole exception of this State's Attorney General, who may maintain an action parens patriae as provided in this subsection." *Id.*

Plaintiff contends that a *parens patriae* action is so different in its nature, prerequisites, and procedural safeguards from a class action that the IAA's explicit grant of authority to the State to bring a *parens patriae* suit excludes this action from the ambit of CAFA. With respect to the nature of the suit, Plaintiff notes that *parens patriae* authority has its origin in common law rather than statute. Plaintiff also states that the function of *parens patriae* suits is to provide a substantive power to the State to protect its citizens rather than a procedural device to consolidate individual claims. See *Illinois v. Huddleston,* 212 Ill.2d 107, 287 Ill.Dec. 560, 816 N.E.2d 322, 337 (Ill.2004). Plaintiff further states that while a class action generally is a private lawsuit pursued for private interests and represented by private attorneys who work on a contingency-fee basis, a *parens patriae* lawsuit is brought by a public entity in its sovereign or quasi-sovereign interest and represented by salaried states' attorneys. With respect to the prerequisites, Plaintiff contends that this type of suit is fundamentally different than a class action: the latter requires numerosity, typicality, and commonality, whereas the former imposes no such constraints. Finally, Plaintiff argues that class actions impose rigorous procedural safeguards to protect absent class members; by contrast, in *parens patriae* suits, the safeguards are limited to due process and the democratic process. Plaintiff thus concludes that this action is a "separate and distinct procedural vehicle from a class action." *Breakman v. AOL LLC,* 545 F.Supp.2d 96, 101, 102 (D.D.C.2008) (holding that a District of Columbia consumer protection statute that authorized representative actions and did not reference class action requirements or mandate class certification was a separate and distinct procedural vehicle from a class action, and thus did not constitute a class action under CAFA); see also *Harvey v. Blockbuster, Inc.,* 384 F.Supp.2d 749, 754 (D.N.J.2005); *Portfolio Recovery Assocs., Inc.,* 686 F.Supp.2d at 946–47; *cf.* *Comcast,* 705 F.Supp.2d at 454.

***10** Defendants counter that the authority bestowed on the State by the IAA to represent private consumers in essence makes the State a class action representative notwithstanding the *parens patriae* label of the suit. Defendants first point out that the suit is "congruent" with the MDL class actions that other States have brought against AU Optronics. Defendants then contend that because the IAA makes the State's authority to bring this type of suit an exception to the general rule against indirect purchaser class actions, it "clearly" intends that *parens patriae* actions should be substitutes for class actions and thus synonymous with them. According to Defendants, the IAA's authorization of this type of suit qualifies the suit as a class action under CAFA. Defendants cite *Comcast* in support of their argument. In *Comcast,* the court considered whether a *parens patriae* suit brought under a state statute was a class action under CAFA. *Comcast,* 705 F.Supp.2d at 453–54. The court held that although the statute was not identical to Rule 23, it so mimicked the Rule with respect to its rigorous safeguards regarding absent parties that it qualified as a "similar statute" under CAFA. *Id.* at 454.

The Court finds Plaintiff's arguments persuasive: because (1) the case was not filed as a class action under Rule 23 (or a state equivalent) and (2) the case instead is a *parens patriae* suit brought under the IAA, it is both in form and substance distinct from an action brought under Rule 23 or a state class action statute. To borrow from the Fourth Circuit's recent opinion in *CYS Pharmacy,* the IAA "authorizes the Attorney General to bring enforcement actions against violators and, in so doing, to pursue relief on behalf of aggrieved individuals. Yet that type of representation by the State is [not] characteristic of the representational nature of a class action * * *." 2011 WL 1902678, at *6. Rather, it "is more analogous to the role of the EEOC or other regulator when it brings an action on behalf of a large group of employees or a segment of the public." *Id.* Accordingly, the Court concludes that this action is not a "class action" under CAFA. See, *e.g., id.; Portfolio Recovery Assocs., Inc.,* 686 F.Supp.2d at 946–47; *In re TFT–LCD (Flat Panel) Antitrust Litig.,* 2011 WL 560593, at *6–*7; *Allstate,* 536 F.3d at 434–35 (Southwick, J., dissenting). Instead, it is "a statutorily authorized action" filed "on the State's behalf" by its top legal officer, the Attorney General. *CYS Pharmacy,* 2011 WL 1902678, at *4.

C. Whether this Action is a "Mass Action" as that Term Is Defined by CAFA

[18] CAFA provides that "mass actions" are removable to federal court. 28 U.S.C. § 1332(d)(11)(A). CAFA defines a mass action as "any civil action * * * in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact, except that jurisdiction shall exist only over those plaintiffs whose claims in a mass action satisfy the jurisdictional requirements under subsection (a) ['where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs']." 28 U.S.C. § 1332(d)(11)(13)(I) & §

1332(a).

***11** Plaintiff argues that the mass action provisions of CAFA do not confer jurisdiction here for three reasons. First, Plaintiff states that this case does not satisfy CAFA's numerosity requirement. 28 U.S.C. § 1332(d)(11)(13)(i). Second, Plaintiff argues that the suit is not a mass action because it does not meet CAFA's $75,000 jurisdictional threshold requirement for mass actions. *Id.* Third, Plaintiff contends that the suit does not fall within CAFA's jurisdictional exception for cases brought on behalf of the general public. See 28 U.S.C. § 1332(d)(11)(B)(ii)(III).FN7

The Court concludes that, for the same reasons that it found the State to be a real party in interest, this suit does not constitute a "mass action" under CAFA. See *Tanoh,* 561 F.3d at 952 (holding that CAFA's requirement of 100 or more plaintiffs refers only to actual, named plaintiffs); *Cal. Pub. Employees Ret. Sys. v. Moody's Corp.,* 2009 WL 3809816, at *7 (N.D.Cal. Nov.10, 2009) (interpreting the mass action provisions of CAFA as requiring plaintiffs to appear and make claims in order to count toward the numerosity requirement, and refusing to count 490 unnamed plaintiffs represented by an unincorporated association who failed to do so toward the numerosity requirements); *Kitazado v. Black Diamond Hospitality Invs., LLC,*, 2009 WL 3209298, at *6 (D.Haw. Oct.6, 2009). Rather, as another court recently summarized in words that apply equally here, "[b]ecause the State is a real party in interest and sues to protect and vindicate the rights of the public in general [under the IAA], this action is not a 'mass action.' " *Connecticut v. Moody's Corp.,* 2011 WL 63905, at *4 (D.Conn. Jan.5, 2011).

III. Conclusion

For the reasons stated above, the Court grants Plaintiff's motion to remand [28]; this case is remanded to the Circuit Court of Cook County.

FN1. Following the removal of this case, the Judicial Panel on Multidistrict Litigation ("JPML") entered an order conditionally transferring this action to the Northern District of California for inclusion in *In re: TFT–LCD (Flat Panel Antitrust Litig.,* MDL No. 1827. Plaintiff moved to vacate the conditional transfer order. On February 3, 2011, the JPML entered an order [MDL docket entry 165] postponing its decision on Plaintiff's motion to vacate until this Court issues its ruling on Plaintiff's motion to remand [28].

FN2. In *Hood v. F. Hoffman–La Roche, Ltd.,* the District Court of the District of Columbia noted that it found *Allstate* to be "instructive," but ultimately did not decide the same issue, as it deemed the State to be a real party in interest with respect to some of the claims asserted and held that the State's presence in the lawsuit defeated diversity. 639 F.Supp.2d 25, 29–32 (D.D.C.2009).

FN3. Defendants attempt to distinguish *SDS West Corp.* on the ground that, unlike here, the defendant in that case sought removal on traditional diversity rather than CAFA grounds. *SDS West Corp.,* 640 F.Supp.2d at 1049. In other words, *SDS West Corp.* hinged on the complete diversity requirement, rather than CAFA's minimal diversity requirement. Similarly, Defendants seek to distinguish *Hunt Int'l* on the ground that the court in that case held that there was no traditional diversity when the Attorney General was present in the case. *Hunt Int'l,* 481 F.Supp. at 74. Finally, Defendants state that *Lann* is inapposite because it involved not removal, but a rejection by the court of the defendants' effort to impose discovery obligations on the individuals for whom the state sought restitution through the action. *Lann,* 167 Ill.Dec. 252, 587 N.E.2d at 523. The Court acknowledges that factual peculiarities of all three cases set them apart from the case at bar, but nonetheless finds their enunciation and application of the general rules regarding real-party-in-interest questions to be instructive.

FN4. Defendants cite *State of Calif. v. Frito–Lay, Inc.,* 474 F.2d 774 (9th Cir.1973), for the proposition that monetary recovery for a subset of residents precludes sovereign interest in the case. In *Frito Lay,* the court ruled that the State attorney general did not have a quasi-sovereign interest in enforcing a federal antitrust law, as the law pertained to a different sovereign. The case is thus distinguishable from the one at bar, in which the State seeks to enforce a state statute. Attorneys general have a sovereign interest in enforcing their own state laws. ***Pennsylvania v. Mid– Atlantic Toyota Distribs., Inc.,* 704 F. 2d 125, 131 (4th Cir. 1983)**. Thus, *Frito Lay* is not persuasive authority on the facts presented here.

FN5. Defendants argue that a finding of lack of jurisdiction would contravene Congress's intent in creating CAFA—namely, to prevent plaintiffs from “artificially structuring their suits to avoid federal jurisdiction.” *Freeman v. Blue Ridge Paper Prods., Inc.,* 551 F.3d 405, 407 (6th Cir.2008). Yet, Defendants do not contend that Plaintiff fraudulently pleaded claims to avoid federal jurisdiction or colluded with private individuals for that purpose. (Indeed, it appears that Plaintiff has in good faith sued in its name alone.) Moreover, Defendants do not appear to dispute that the State has a quasi-sovereign interest in the claims for injunctive relief and civil penalties under the IAA.

FN6. Both parties devote a significant number of pages to arguing that CAFA's legislative history supports their respective positions. For example, Defendants submit that CAFA's legislative history indicates that the statute was not designed to prevent removal of suits brought by states' attorneys general, as Congress rejected an amendment that would explicitly have prevented such removal. However, as the Northern District of California recently found in its order remanding Washington and California State cases against AU Optronics to state courts, “the legislative history of CAFA * * * does not clearly demonstrate a congressional intent that CAFA should apply to *parens patriae* actions. See also *Harvey v. Blockbuster, Inc.,* 384 F.Supp.2d 749, 752–54 (D.N.J.2005) (surveying CAFA's legislative history and concluding that it was not Congress'[s] intent to encroach upon States' authority to bring *parens patriae* actions).” *In re TFT–LCD (Flat Panel Antitrust Litig.),* 2011 WL 560593, at *3. This Court need not delve into the legislative history to resolve the remand motion. However, the Court notes that, in view of the long history of *parens patriae* actions and the traditional approach to determining the real party in interest in a lawsuit, the absence of any express provision in CAFA authorizing removal of *parens patriae* suits more strongly suggests that Congress did not intend CAFA to apply to actions in which the State (through its Attorney General) asserts sovereign or quasi-sovereign interests in litigation.

FN7. CAFA's mass action “carve-out” provision states that “the term ‘mass action’ shall not include any civil action in which (III) all of the claims in the action are asserted on behalf of the general public (and not on behalf of individual claimants or members of a purported class) pursuant to a State statute specifically authorizing such action * * *.” 28 U.S.C. §

1332(d)(11)(B)(ii) (III).

N.D.Ill.,2011.
Illinois v. AU Optronics Corp.
--- F.Supp.2d ----, 2011 WL 2214034 (N.D.Ill.)

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United States District Court,
N.D. California.
In re DYNAMIC RANDOM ACCESS MEMORY (DRAM) ANTITRUST LITIGATION.
This Document Relates to:
State of New York v. Micron et al. (C 06-6436 PJH).

No. M 02-1486 PJH.
Aug. 31, 2007.

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION TO DISMISS

PHYLLIS J. HAMILTON, United States District Judge.

***1** Defendants' motion to dismiss plaintiff's complaint came on for hearing before this court on February 7, 2007. Plaintiff, the State of New York acting through its Attorney General, appeared through its counsel, Jeremy R. Kasha and Richard L. Schwartz. Defendants appeared through their counsel, Julian Brew, Ronald C. Redcay, Joel S. Sanders, Peter Nemerovski, Kenneth R. O'Rourke, Harrison J. Frahn, Gary L. Halling, and Robert B. Pringle. Having read all the papers submitted and carefully considered the relevant legal authority, the court hereby GRANTS defendants' motion to dismiss in part and DENIES the motion to dismiss in part, for the reasons stated at the hearing, and as follows.

BACKGROUND

The instant case is part of a broader antitrust MDL action currently pending before the court. Plaintiff, the State of New York, like various other plaintiffs in the MDL action, generally alleges a horizontal price-fixing conspiracy in the U.S. DRAM market for dynamic random access memory (“DRAM”), carried out by numerous manufacturer defendants.[FN1]

FN1. The named defendants are: Micron Technology, Inc.; Micron Semiconductor Products, Inc.; Infineon Technologies AG; Infineon Technologies North America Corp.; Hynix Semiconductor, Inc.; Hynix Semiconductor America, Inc.; Samsung Electronics Co., Ltd; Samsung Semiconductor, Inc.; Mosel Vitelic Corp.; Mosel Vitelic, Inc.; Nanya Technology Corporation; Nanya Technology Corporation USA, Inc.; Elpida Memory, Inc.; Elpida Memory (USA), Inc.; and NEC Electronics America, Inc. (collectively “defendants”).

A. Background Allegations and Claims

Plaintiff's complaint alleges that beginning in 1999, defendants entered into a “secret, worldwide conspiracy designed to eliminate competition” in the U.S. market for DRAM. *See* Complaint at ¶ 2. Defendants did so by allegedly coordinating the prices they charged to large computer manufacturers (“OEM”s) and other customers. *Id.* Plaintiff alleges that, over a period of three years, defendants engaged in hundreds, if not thousands, of pricing communications, in order to succeed in their principal objective to control and artificially raise DRAM prices. *Id.* As a result, plaintiff alleges that consumers of computers and other digital devices paid more for DRAM, or purchased less of it, than they would have in a competitive market. *Id.*

Plaintiff contends that defendants' conspiracy caused “enormous damage to users of DRAM-containing products and DRAM memory chips.” Complaint at ¶ 5. Among those damaged, according to plaintiff, were New York residents, businesses, schools and government entities, all of whom purchased significant quantities of products containing price-fixed DRAM chips. *Id.* To that end, plaintiff State of New York brings the instant action in its own proprietary capacity, and as parens patriae and as authorized by law on behalf of its consumers-both natural persons and entities. *See* Complaint, ¶ 10. Specifically, plaintiff brings this action on behalf of: (a) "state and local government branches, departments, agencies, subdivisions and other entities" ("government entities") that purchased DRAM or DRAM products from defendants *directly or indirectly;* and (b) natural persons in New York who purchased DRAM or DRAM products from defendants *indirectly. See id.*

Plaintiff's complaint, which was filed on July 13, 2006, asserts four causes of action against defendants: (1) a federal antitrust claim for violation of Section 1 of the Sherman Act; (2) a state antitrust claim for violation of New York's Donnelly Act; (3) a claim pursuant to New York's Executive Law § 63(12), which allows the State Attorney General to enjoin "fraudulent or illegal acts" in the "carrying on, conducting or transaction of business"; and (4) a claim pursuant to California's state antitrust statute, the Cartwright Act. *See, e.g.,* Complaint at ¶¶ 81-86, 87-92, 93-95, 96-101.

B. The Instant Motion

***2** Defendants seek dismissal in part of plaintiff's first and second causes of action, and dismissal of plaintiff's third and fourth causes of action in their entirety.[FN2] In particular, defendants seek dismissal of (1) the Sherman Act claim to the extent it is based on indirect purchases and seeks recovery on behalf of unnamed government entities; (2) New York's claim for a civil penalty under the Donnelly Act; (3) claims under New York's Executive Law § 63(12); and (4) New York's Cartwright Act claim.

FN2. Defendants have also filed a motion to dismiss similar claims alleged in a separate but related case brought by forty other plaintiff States acting through their Attorneys General. *See State of California et al. v. Infineon Technologies AG, et al.,* case no. C 06-4333 PJH. The merits of that motion are discussed by way of a separate order, filed concurrently herewith.

DISCUSSION

A. Legal Standard

In evaluating a motion to dismiss, all allegations of material fact are taken as true and construed in the light most favorable to the nonmoving party. *See, e.g., Burgert v. Lokelani Bernice Pauahi Bishop Trust,* 200 F.3d 661, 663 (9th Cir.2000) (citations omitted). In order to survive a dismissal motion, however, a plaintiff must allege facts that are enough to raise his/her right to relief "above the speculative level." *See Bell Atlantic Corp. v. Twombly,* --- U.S. ----, 127 S.Ct. 1955, 1964-65 (2007). While the complaint "does not need detailed factual allegations," it is nonetheless "a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' [which] requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.*

In short, a plaintiff must allege "enough facts to state a claim to relief that is plausible on its face," not just conceivable. *Twombly,* 127 S.Ct. at 1974.

B. Sherman Act Claim

Defendants raise two issues regarding plaintiff's first claim for relief under the Sherman Act. First, defendants argue that plaintiff's complaint impermissibly seeks damages for injuries sustained by indirect purchasers, in violation of the federal *Illinois Brick* doctrine. *See* Mot. at 3:1-10; *Illinois Brick Co. v. Illinois,* 431 U.S. 720 (1977). Second, defendants contend that plaintiff also impermissibly asserts claims on behalf of state and local government entities. Defendants contend, therefore, that all claims brought on behalf of indirect purchasers or government entities, must be dismissed.

1. indirect purchaser claims

Defendants rely on paragraphs 10 and 86 of plaintiff's complaint in order to make their point. Paragraph 86, which sets forth plaintiff's Sherman Act claim, alleges that "the State is entitled to recover treble damages, *based on the injury that the State Entities suffered* as a result of Defendants' illegal conduct" (emphasis added). The phrase "State Entities" is in turn defined in paragraph 10 to include all state and local government entities who purchased DRAM or DRAM products "directly *or* indirectly" from defendants (emphasis added). Defendants argue that, reading these allegations together, it is undisputed that plaintiff's Sherman Act claim seeks recovery, at least in part, for injuries suffered by indirect purchasers-something that *Illinois Brick* prohibits. Plaintiff concedes that *Illinois Brick* does not allow for recovery of indirect purchaser injuries, but states that its Sherman Act claim "is brought solely on behalf of the State and other non-State public entities that are direct purchasers." *See* Opp. Br. at 3:18-19.[FN3]

> FN3. Plaintiff contends that direct purchaser status is given to it and to other government entities by operation of an assignment clause contained in a Centralized Contract between one of plaintiff's state agencies and certain OEMs, as well as by operation of the "control exception" to *Illinois Brick. See* 431 U.S. at 736 n. 16 (exception to indirect purchaser prohibition might apply "where the direct purchaser is owned or controlled by its customer").

***3** Defendants' argument is valid. A logical reading of the allegations contained in plaintiff's complaint-and specifically paragraph 86, as modified by paragraph 10-does suggest that plaintiff is seeking damages based in part, on indirect purchases made by government entities. Notwithstanding the fact that plaintiff concedes that it can only proceed as to direct purchaser claims, and its avowal that it seeks to do so, the allegations of plaintiff's complaint indicate otherwise. To the extent the complaint states as much, therefore, these indirect purchaser claims are barred pursuant to *Illinois Brick's* well-established prohibition on such claims.

Accordingly, the court hereby DISMISSES all claims brought pursuant to the Sherman Act that seek recovery on behalf of indirect purchasers, to the extent such claims are pled in paragraphs 86 and 10 of the complaint.

2. government entities

Even once all claims brought under the Sherman Act are whittled down to direct purchaser claims, defendants challenge plaintiff's ability to assert such claims on behalf of other government entities (i.e., "state and local government branches, departments, agencies, subdivisions and other entities"). *See* Complaint at ¶¶ 10, 86. Defendants argue that such representative claims are barred here, as neither federal nor state statute authorizes representative claims for damages. Plaintiff, for its part, contends that its' representative claims are permissible for two reasons: first, because all government entities here have expressly assigned their antitrust claims to plaintiff State of New York, thereby giving plaintiff standing to assert claims on their behalf. Second, plaintiff argues that New York statutory authority does permit plaintiff's Sherman Act claim on behalf of government entities.

Generally speaking, a state and its political subdivisions are considered "persons" for purposes of securing treble damages under the Sherman Act pursuant to section 4 of the Clayton Act. *See, e.g., Hawaii v. Standard Oil Co.,* 405 U.S. 251, 260-61 (1972); 15 U.S.C. § 15. As such, these government entities may bring suits for monetary damages, and most often do, in their proprietary capacities. *See, e.g., Standard Oil Co. of California v. Arizona,* 738 F.2d 1021, 1023 (9th Cir.1984) ("it is well established that states are "persons" capable of bringing treble damage actions under the Sherman and Clayton Acts). Here, however, while plaintiff State of New York does bring suit in its own name and in its proprietary capacity, it also asserts claims on behalf of other government entities. *See* Complaint at ¶¶ 10, 86. Normally, a plaintiff state might assert such a representative claim by bringing a class action on behalf of the other government entities. *See* Fed. R. Civ. Proc. 23. Plaintiff has not alleged a class action. As such, the issue for the court is whether plaintiff nonetheless has the authority to assert a representative claim on behalf of government entities.

***4** Preliminarily, defendants are correct that the federal Clayton Act does not permit representative claims on behalf of other government entities. *See* 15 U.S.C. § 15. The Clayton Act *does* allow a state attorney general to bring a parens patriae claim on behalf of natural persons, but that provision expressly limits parens patriae actions to those brought on behalf of natural persons, and does not include corporations, partnerships, or proprietorships. *See id.* at § 15c(a)(1). By extension, government entities are similarly excluded from the definition of natural person.

Since the Clayton Act does not grant plaintiff standing to sue on behalf of the government entities alleged in the complaint, the question is whether any other source of law grants the standing sought. Or more specifically, the question is whether New York state law provides standing. For as the Ninth Circuit has stated, "in determining whether a state has standing to sue on behalf of its constituent units under the federal antitrust laws, the federal court must look to the applicable state law." *See, e.g., Alaska v. Chevron,* 669 F.2d 1299, 1302 (9th Cir.1982) (holding that where state of Alaska would permit its attorney general to bring antitrust action on behalf of state university and state university would have direct purchaser standing, state of Alaska could sue as direct purchaser on behalf of state university). Although the *Chevron* case involved the state's right to sue on behalf of a state entity only, and not on behalf of non-State public entities such as the local government entities alleged here, *see, e.g.,* Complaint at ¶ 10, *Chevron'* s reasoning is nonetheless applicable. As such, if plaintiff can demonstrate that applicable New York law grants it standing to sue on behalf of other government entities, it will have standing here.

Plaintiff attempts to prove that standing exists by virtue of (1) certain assignment clauses contained in various contracts entered into by the government entities in question; and (2) New York statutory authority.

With respect to the former, plaintiff alleges that the government entities in question generally made purchases of DRAM-containing products from OEMs, who in turn purchased DRAM directly from defendants. *See* Complaint at ¶ 72. However, many government entities made their purchases from OEMs pursuant to a Centralized Contract entered into by the State of New York's Office of General Services ("OGS"), and the OEMs. *Id.* at ¶ 73. Plaintiff alleges that the government entities' purchase of DRAM-containing products-specifically, computers-from OEMs actually qualify as *direct* purchases of DRAM from defendants, because the Centralized Contract contains an assignment clause that reads: "the "Contractor hereby assigns to the State any and all its claims ... which may arise under the antitrust laws of the United States ... and the antitrust laws of the State of New York....". *See id.* at ¶¶ 74-75. Plaintiff here argues that, by virtue of this assignment clause, each government entity has assigned its direct purchaser claims to the State of New York, thereby granting plaintiff standing to sue on their behalf.

***5** This argument is problematic. To begin with, plaintiff has not cited to any legal authority establishing that assignment of a federal antitrust claim from government entities to the State of New York confers standing on plaintiff to bring a representative suit for damages under the Clayton Act. *But see Com. of Pa. v. Milk Industry Management Corp.,* 812 F.Supp. 500 (E.D.Pa.1992) (school district's assignment of its antitrust cause of action to Pennsylvania's Attorney General gave Pennsylvania standing to maintain *parens patriae* action on behalf of state entity against dairies for alleged bid-rigging). Even assuming, however, that a contractual assignment of rights *can* convey standing to sue, the fact remains that plaintiff has not demonstrated that any valid assignment has taken place between appropriate parties. Under the terms of the assignment clause in the Centralized Contract, it is the "contractor" who assigns all antitrust claims to the state of New York. *See* N.Y. AG Complaint, ¶ 75. But, as alleged in the complaint, it is the *OEMs* who are the contracting parties. *See id.* at ¶¶ 73-75.

In other words, it is the *OEMs* who have assigned their claims to the State of New York, *not* the government entities on whose behalf plaintiff purports to sue. This makes sense, since it is the OEMs who are alleged to have purchased DRAM directly from defendants. It also, however, means that plaintiff's assertion that government entities have assigned direct purchaser claims to it via the assignment clause, is wrong.FN4 As such, the court concludes that plaintiff's representative claim brought on behalf of government entities, if it is to go forward, cannot be rooted in the Centralized Contract's assignment clause.

FN4. Plaintiff also alleges that other individual contracts were entered into between OGS and OEMs pursuant to the Centralized Contract, and that many government entities therefore made their DRAM-containing purchases from OEMs "with the Centralized Contract as a framework." *See* Complaint at ¶¶ 76-79. These allegations cannot save plaintiff's argument, however, since plaintiff nowhere alleges that the government entities were themselves ever assigned any direct purchaser claims by the OEMs, let alone that the government entities in turn assigned those claims to plaintiff State of New York. Without this nexus alleged, plaintiff cannot establish that it is a direct purchaser standing in the shoes of the government entities.

The question remains whether plaintiff's representative claim can go forward based upon New York statutory law. Plaintiff argues that the State Attorney General has the express authority to bring suit on behalf of government entities pursuant to N.Y. Gen. Bus. Law § § 340-347 et seq. (the "Donnelly Act"), and N.Y. Executive Law §§ 63(1) and 63-c(1). Defendants, however, challenge plaintiff's reliance on either state statute, arguing that no provision allows the state to sue on behalf of *unnamed* government entities.

Defendants have the better argument. The Donnelly Act does, as plaintiff notes, give the State Attorney General the right to bring an action "on behalf of any political subdivision or public authority of the state ... to recover damages provided for by federal law for violations of the federal antitrust laws ...". *See* N.Y. Gen. Bus. Law § 342-b. However, the text of this provision also states that the action is to be brought "upon the request of such political subdivision or public authority." *See id.* And as defendants point out, there is no allegation in the present complaint stating either that the government entities at issue have requested that the present action be instituted on their behalf, or that even identify the entities at issue.

***6** *New York v. Cedar Park Concrete Corp.,* 665 F.Supp. 238, 241-42 (S.D.N.Y.1987), is remarkably on point, and proves instructive. There, the court considered the same issue-i.e., whether the state could properly represent government entities in an antitrust action seeking treble damages pursuant to the Clayton Act, where the state also sought damages for violation of the Donnelly Act. *See id.* As here, no class action was pled, and the court looked to state statutes to see if a representative suit was authorized. In construing the same Donnelly Act provision that plaintiff cites to this court, the *Cedar Park Concrete* court held that a predicate had to be established in order to prove that the State Attorney General had been "requested" to act on behalf of the state entities. While the court found that a sufficient predicate had been established with respect to one state entity, the court found that the "other state subdivisions on whose behalf the state of New York sues .. are not named in the complaints" and that "in view of the need early in the litigation to identify state-affiliated purchasers, we believe the complaints should be dismissed insofar as they purport to state treble damages claims on behalf of unidentified state subdivisions." *Id.* at 242.

The court adopts this reasoning here. As such, plaintiff's failure to allege either that the government entities in question requested that plaintiff bring suit on their behalf, or to name or identify the government entities in question, means that plaintiff's representative claim on behalf of those government entities must be dismissed insofar as the Donnelly Act is concerned.

Plaintiff's arguments with respect to New York Executive Law §§ 63(1) and 63-c(1) fare no better. Although it is true that the first of these provisions, for example, does provide statutory authority for the State Attorney General to prosecute and defend "all actions and proceedings in which the state is interested," it nowhere mentions suit on behalf of government entities, let alone authorizes representative actions on behalf of the government entities on whose behalf plaintiff sues here. *See, e.g.,* Complaint at ¶ 10 (defining "State Entities" as "all state and local government branches, departments, agencies, subdivisions and other entities ...") (emphasis added). As for N.Y. Executive Law § 63-c(1), it specifically states that the State Attorney General's enforcement is limited to violations of the section itself, which allows the Attorney General to bring a claim wherever state or local government entities have had public funds or property unlawfully converted or appropriated. *See* N.Y. Exec. Law § 63-c (1) ("The attorney-general shall commence an action, suit or other judicial proceeding, *as prescribed in this section,* whenever he deems it for the interests of the state so to do ...") (emphasis added). Here, plaintiff has not actually alleged any cause of action pursuant to this law.

***7** In sum, the court concludes that plaintiff has provided no legal authority expressly authorizing plaintiff's representative claim under the Sherman Act on behalf of the unnamed government entities alleged in plaintiff's complaint. As such, plaintiff's claims in this regard must be, and are, hereby DISMISSED. Leave to amend is granted, however, in order to allow plaintiff to cure the deficiencies noted herein with respect to the requisite showing that must be made pursuant to the Donnelly Act's authorization for representative claims on behalf of state government entities. The court also notes that, given the general ambiguity in plaintiff's complaint as to the specific entities on whose behalf plaintiff brings suit, and the direct or indirect nature of those entities' DRAM purchases, plaintiff must allege in any future amendment, the nature of the purchases made by specific government entities. This will enable the court to determine with specificity the purchases and entities upon which plaintiff's representative claims are stated.

C. Donnelly Act Claim

Defendants also challenge plaintiff's second claim for relief, which is brought pursuant to New York's antitrust statute, the Donnelly Act. *See* N.Y. Gen. Bus. Law § 342 et seq. Plaintiff's Donnelly Act claim alleges that plaintiff is entitled to recover damages "on behalf of all State Entities" that purchased DRAM/DRAM products directly or indirectly from defendants, and "on behalf of all natural persons in New York" who purchased DRAM/DRAM products indirectly from defendants. *See* Complaint at ¶ 92. Plaintiff furthermore alleges that it, "in its sovereign capacity, is also entitled to recover civil penalties" pursuant to the Donnelly Act, and injunctive relief. *Id.*

Defendants challenge plaintiff's claim on three grounds: (1) that plaintiff may not bring a Donnelly Act claim on behalf of unnamed and unidentified governmental entities; (2) that plaintiff may not bring a Donnelly Act claim that seeks damages on behalf of natural persons; and (3) that plaintiff may not recover civil penalties under the Act.

1. unnamed government entities

Defendants' argument that plaintiff may not bring a claim under the Donnelly Act on behalf of unnamed entities, and plaintiff's arguments to the contrary, have already been discussed above in connection with plaintiff's ability to file a representative claim on behalf of these entities under the Sherman Act.

The same analysis that applied there, applies here. In sum, while the Donnelly Act does provide express statutory authority for the State Attorney

General to sue on behalf of "any political subdivision or public authority of the state," the Donnelly Act contemplates that these government entities must be specifically identified, and it must affirmatively be demonstrated that they have "requested" that the Attorney General bring suit on their behalf. *See* N.Y. Gen. Bus. Law § 342-b ("the [A]ttorney [G]eneral may also bring action on behalf of any political subdivision or public authority of the state upon the request of such political subdivision or public authority to recover damages for violations of section three hundred forty of this article ..."); *New York v. Cedar Park Concrete Corp.,* 665 F.Supp. 238, 241-42 (S.D.N.Y.1987). Since, as noted above, the government entities on whose behalf plaintiff sues here are not identified in the complaint, nor is it alleged that they have requested the Attorney General's representation, plaintiff's Donnelly Act claim on their behalf is DISMISSED.

***8** As noted above, however, plaintiff is granted leave to amend in order to properly name and identify the entities on whose behalf it brings suit. And as required above, plaintiff's indirect or direct purchaser status must be provided.

2. damages on behalf of natural persons

Defendants argue that the Donnelly Act does not permit the Attorney General to assert a damages claim on behalf of natural persons. Plaintiff responds that the Attorney General's authority to do so is grounded in two sources: its common law parens patriae powers, and statutory law.

Preliminarily, and beginning first with the provisions of the Donnelly Act, the court notes that defendants are correct in arguing that the Act itself does not authorize the Attorney General to pursue damages claims on behalf of natural persons. To be sure, the Act *does* contemplate that the Attorney General may file claims "in behalf of the people of the state ...". *See* N.Y. Gen. Bus. Law § 342. However, the Act specifically limits such claims to those seeking injunctive relief, or civil penalties under the Act. *See id.* at § 342-a. By contrast, the separate provision of the Act that expressly governs the Attorney General's ability to pursue *damages* claims under the Act, unambiguously limits such actions to those "on behalf of any political subdivision or public authority of the state." *See id.* at § 342-b. Presumably, the legislature knew how to include language granting the Attorney General the right to sue "in behalf of the people of the state" in the Act's damages relief provision, as it did so with respect to the provisions allowing actions for injunctive relief and civil penalties. Accordingly, the court concludes that the legislature's failure to include similar language in the provision authorizing damages suits was deliberate. As such, plaintiff may not assert a claim for monetary damages under the Act on behalf of natural persons.

Plaintiff argues that the Attorney General's authority to bring such claims can nonetheless be grounded in either common law, or other statutory law. Ultimately, the court is unpersuaded as to either ground.

The argument that the Attorney General has common law authority to bring monetary damages claims on behalf of natural persons (i.e., parens patriae authority) has been discussed in detail, in connection with the court's related order on defendants' motion to dismiss the claims filed by various other State Attorneys General. *See* Order Granting in Part and Denying in Part Defendants' Motion to Dismiss, *State of California, et al. v. Infineon Technologies AG, et al.,* C 06-4333 PJH (filed concurrently herewith, and incorporated by reference). As the court states therein, there is no broadly recognized common law parens patriae right to pursue monetary damages claims, and cases discussing the common law parens patriae right have generally been limited to cases seeking injunctive or other equitable relief. *See, e.g., Hawaii v. Standard Oil Co.,* 405 U.S. 251; *In re Multidistrict Vehicle Air Pollution,* 481 F.2d 122, 131 (9th Cir.1973) (distinguishing availability of parens patriae authority for suits seeking injunctive relief, from suits seeking damages). This being the case, the court looks for the existence of any state law that expressly authorizes a suit by the Attorney General for monetary damages on behalf of natural persons.

***9** Here, plaintiff has not cited any cases that support the proposition that the State Attorney General is vested with parens patriae authority to institute suits for monetary damages. Plaintiff's reliance on *In re Insurance Antitrust Litig.*, which states that a parens patriae action can vindicate its state interest "by obtaining damages and/or an injunction," is inapposite. *See,* 938 F.2d 919, 927 (9th Cir.1991), *aff'd in part & rev'd in part sub nom. Hartford Fire Ins. Co. v. California,* 509 U.S. 764 (1993). First, the language plaintiff relies on is dictum. Second, and more importantly, the court's statement was based directly on its reading of the Supreme Court's language in *Alfred L. Snapp & Son, Inc. v. Puerto Rico,* 458 U.S. 592, 607 (1982). The *Snapp* case, in turn, dealt with a parens patriae claim that sought declaratory and injunctive relief only-*not* damages. Moreover, *People ex rel. Spitzer v. Grasso,* recently decided by a New York state appellate court, counsels against a finding that the State Attorney General is vested with the authority sought by plaintiff. *See* 836 N.Y.S.2d 40 (N.Y.App.Div.2007). There, the court considered whether the Attorney General's common law powers allowed the Attorney General to assert certain non-statutory causes of action, which the Attorney General sought to allege alongside statutory causes of action that were authorized by New York's Not-for-Profit-Corporation ("N-PCL") statute. *See id.* at 41. In its discussion, the court cited with approval previous state cases that noted "[w]here the Legislature has not been completely silent but has instead made express provision for civil remedy, albeit a narrower remedy than the plaintiff might wish, the court should ordinarily not attempt to fashion a different remedy, with broader coverage." *See id.* at 48. To that end, the court ultimately found that, in view of the NPCL's many remedial choices, and the N-PCL's failure to even "hint" at the Attorney General's authority to bring causes of action other than those authorized in the statute, the Attorney General lacked such authority. *Id.* at 49-50.

The court is persuaded by this reasoning. In sum, in view of the Donnelly Act's provisions setting forth the various remedies that the Attorney General is entitled to pursue, none of which includes monetary damages on behalf of natural persons, the court concludes that authority for such a suit under the Donnelly Act is lacking, and cannot be premised on the Attorney General's general common law powers.

Plaintiff's secondary argument that authority for a parens patriae claim seeking monetary damages may be grounded in New York statutory authority, is similarly flawed. Plaintiff bases this argument on New York Executive Law § 63(12). This statute does, as plaintiff contends, authorize the State Attorney General to sue "in the name of the people of the State of New York" in order to enjoin "repeated fraudulent or illegal acts" or "persistent fraud or illegality in the carrying on, conducting or transaction of business ." *See id.* However, while this provision *may* allow the Attorney General to sue on behalf of natural persons as a result of fraud and illegality (and it is by no means clear that such a suit could properly seek monetary damages), this is no way suffices to authorize similar Attorney General actions under the *Donnelly Act*, particularly since the Donnelly Act itself, as noted above, expressly denies the Attorney General such authority. Moreover, although plaintiff relies on *In re Cardizem* and *In re Lorazepam*-cases also discussed in connection with the various state attorney generals' motion papers-those cases are not controlling. *See* 218 F.R.D. 508 (E.D.Mich.2003); 205 F.R.D. 386 (D.D.C.2002). Furthermore, neither case specifically discussed the authority of the State Attorney General to sue for *monetary damages* on behalf of natural persons.

***10** In sum, plaintiff has failed to point to any New York authorities that affirmatively vest the State Attorney General with authority to assert a parens patriae claim for monetary damages on behalf of natural persons, pursuant to the Donnelly

Act. In view of all the above, the court concludes plaintiff's claim for damages under the Act on behalf of natural citizens must be and is accordingly DISMISSED.

3. civil penalty under Donnelly Act

Finally, the parties dispute whether the State Attorney General may properly seek civil penalties pursuant to the Donnelly Act. The relevant provision of the Act provides: "the attorney-general may bring an action in the name and in behalf of the people of the state ... to recover a penalty ... for the doing in this state of any act herein declared to be illegal, or any act in, toward or for the making or consummation of any contract, agreement, arrangement or combination herein prohibited, wherever the same may have been made ...". *See* N.Y. Gen. Bus. Law § 342-a. Defendants assert that this language plainly requires plaintiff to allege either that an illegal contract was entered into in the State of New York, or else that some act in New York is or was "preparatory" to the creation of an illegal agreement. Plaintiff's complaint, defendants continue, fails to make any such allegation. Plaintiff, in response, contends that its allegations relating to IBM, an OEM "headquartered" in New York, are sufficient. *See, e.g.,* Complaint at ¶¶ 38, 45, 47, 50-51, 58.

Preliminarily, the court must decide what type of "acts" the relevant provision of the Donnelly Act requires plaintiff to allege. Defendants are correct that the plain language of the statute permits civil penalties to be recovered for the "doing in this state" of certain "acts"-i.e., the doing of certain acts in New York specifically. *See* N.Y. Gen. Bus. Law § 342-a. Defendants are also correct that under the language of the Act, qualifying acts might include either entering into the alleged price-fixing conspiracy in New York, or acts of preparation completed in New York in order to enter into a price-fixing conspiracy elsewhere. *See id.* However, contrary to defendants' interpretation, in stating that a qualifying act may be one that goes "toward or for the making or consummation of any contract, agreement, arrangement or combination herein prohibited," this court interprets the Act as requiring only that an act be done in the State of New York that bears on the defendants' completion of their price-fixing agreement-even if the agreement was entered into elsewhere. *See* N.Y. Gen. Bus. Law § 342-a.

The question, then, is whether plaintiff's complaint alleges, at a minimum, an act done in New York, that bears on the consummation of defendants' global price-fixing conspiracy. In this respect, plaintiff's allegations are sufficient. Plaintiff alleges that "New York residents, businesses, schools and government entities purchased significant quantities of products containing price-fixed DRAM chips." *See* N.Y. AG Complaint, ¶ 5. Plaintiff also alleges that numerous state entities purchased DRAM from OEMs, including IBM, and that such purchases are generally in the hundreds of millions of dollars. *Id.* at ¶¶ 72-79. Plaintiff furthermore alleges that natural persons in New York paid higher prices for DRAM than they would have in a competitive market." *See id.* at ¶ 91. These allegations demonstrate that consumers in New York, as well as state entities and businesses, paid illegally high prices for DRAM. The purchase of a product at an artificial overcharge, is an act toward the consummation of defendants' price-fixing conspiracy. As such, the court concludes that plaintiff's allegations sufficiently set forth a basis for a civil penalty pursuant to New York General Business Law § 342-a.

***11** Accordingly, and in view of all the above, the court DENIES defendants' motion to dismiss plaintiff's Donnelly Act claim, to the extent it seeks a civil penalty pursuant to New York General Business Law § 342-a.

D. Executive Law § 63(12)

Defendants argue that plaintiff's claim pursuant to New York Executive Law § 63(12) is also deficient in several respects: (1) the claim itself is untimely; (2) plaintiff lacks authority to assert claims on behalf of unnamed government entities; (3) all actions pursuant to the statute must be filed in New York state courts; and (4) no treble damages are permissible under the statute.

1. untimeliness

Defendants contend that plaintiff's claim is subject to a three year statute of limitations. Specifically, since plaintiff alleges that the claim is premised on statutory violations under the Sherman and Donnelly Acts, *see* Complaint at ¶ 94, defendants argue that the proper statute of limitations is the three year limitations period set forth in N.Y. C.P.L.R. § 214(2), which governs "liabilities imposed by statute." As such, defendants assert that the complaint-filed in July 2006-was untimely, since the conduct alleged therein ceased in June 2002. Plaintiff, in response, contends its claim pursuant to Executive Law § 63(12) is governed by a six year statute of limitations rather than the three year statute, and that even under the three year statute, the limitations period has been tolled.

Beginning first with the applicable statute of limitations period, plaintiff is correct that the six year limitations period applies, rather than the three year limitations period. It is undisputed that plaintiff's claim is premised on statutory provisions, and that under N.Y. C.P.L.R. § 214(2), actions based on statutes are normally subject to a 3 year limitation period. *However,* plaintiff is correct that New York's highest court has expressly stated that section 214(2) will nonetheless *not* apply where the statute upon which an action is based had a common law precedent. *See State v. Cortelle Corp.,* 38 N.Y.2d 83, 87 (N.Y.1975); *see also Gaidon v. Guardian Life,* 750 N.E.2d 1078, 1092 (N.Y.2001). Indeed, in *Cortelle,* the court considered an identical claim brought pursuant to Executive Law § 63 (12), and held that the six year statute of limitations applied. *See* 38 N.Y.2d at 88-89. Although *Cortelle* was premised on a fraud claim, its reasoning applies here, as plaintiff has relied on case law indicating that, like the fraud claim in *Cortelle,* an antitrust claim was also recognized at common law. *See Judd v. Harrington,* 34 N.E. 790, 791 (N.Y.1983). In view of this authority, the court finds that N.Y. C.P.L.R. § 214(2) is inapplicable, and the six year limitations period provided pursuant to N.Y. C.P.L.R. § 213(1) applies instead.

Defendants attempt to avoid this conclusion by noting that antitrust claims for damages are to be considered differently than antitrust claims in equity, which were the only type of antitrust claims allowable at common law. Defendants fail to support this argument with any controlling or persuasive authority, however. *Pauk v. Bd. of Trustees,* for example, dealt with the borrowing of state limitations statutes in the context of a federal section 1983 cause of action, and *Hartnett v. N.Y. City Transit Auth.* also dealt with an inapposite law, Labor Law § 27-a(10). *See* 654 F.2d 856 (2d Cir.1981); 612 N.Y.S.2d 613 (N.Y.App.Div.1994).

***12** In sum, the court finds that the six year statute of limitations governs here, and plaintiff's claim is therefore timely. In view of this finding, it is unnecessary for the court to reach the question whether equitable tolling would nonetheless apply under a 3 year statute of limitations. Defendants' motion to dismiss this claim on timeliness grounds is DENIED.

2. government entities

Defendants once again raise the argument that the State Attorney General is not authorized to assert representative claims for monetary damages on behalf of government entities for violations of the federal or state antitrust acts.

For the same reasons as discussed above in connection with plaintiff's Sherman Act and Donnelly Act claims, defendants are correct that Executive Law § 63 does not vest the State Attorney General with authority to bring representative claims on behalf of unnamed government entities. Nor do any other statutes provide such authority. As such, plaintiff's claim on behalf of government entities pursuant to New York's Executive Law § 63(12) is accordingly DISMISSED.

3. state court limitation

Defendants claim that Executive Law § 63(12) expressly mandates that all actions "be commenced in New York State Supreme Court." *See* N.Y. Exec. Law § 63(12). Plaintiff acknowledges this, but argues that this court's authority to hear the claim is based on its supplemental jurisdiction stemming from the court's jurisdiction over the federal Sherman Act claim. Accordingly, claims plaintiff, jurisdiction is conveyed by federal statute, which supercedes the state statute.

Defendants are correct that Executive Law § 63 (12) law explicitly states that any claims brought under it must be commenced in state court. *See* N.Y. Exec. Law § 63(12); *see also New York v. Gen. Motors Corp.*, 547 F.Supp. 703, 704 n. 2 (D.C.N.Y.1982). However, plaintiff is also correct that it may properly assert a federal claim in federal court, thereby allowing the court to exercise supplemental jurisdiction over plaintiff's state law claims. *See* 28 U.S.C. § 1367 ("the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution ...").

As such, despite the fact that Executive Law § 63(12) contains a procedural limitation on the place in which suit may be brought, this court may nonetheless assert supplemental jurisdiction over the claim. Accordingly, the court hereby DENIES defendants' motion to dismiss plaintiff's claim on this ground.

4. treble damages

Finally, defendants argue that Executive Law § 63(12) does not provide for treble damages.

Defendants are correct. The statute states that the Attorney General may apply for "restitution and damages," along with other forms of relief. *See* N.Y. Exec. Law § 63(12). The court declines to read treble damages into the word "damages," however, both as a matter of sound statutory construction, and in view of the fact that the legislature has elsewhere included treble damages provisions in statutory provisions, thus proving that its omission from the present statute was intentional. *See, e.g.*, N.Y. Gen. Bus. Law § 340 et seq. (i.e., the Donnelly Act).

***13** Moreover, plaintiff's reliance on supporting case law is misplaced, since the cases cited by plaintiff did not involve recovery of treble damages pursuant to Executive Law § 63(12), or else did not involve actual discussion of the precise issue before the court.

In sum, the court accordingly DISMISSES plaintiff's claim pursuant to Executive Law § 63 (12), to the extent plaintiff alleges recovery of treble damages.

E. Cartwright Act Claim

Defendants move to dismiss plaintiff's claim under the Cartwright Act, to the extent that plaintiff seeks recovery on behalf of both government entities, and natural persons.

For the same reasons discussed by the court in its related order on defendants' motion to dismiss in *State of California et al., v. Infineon Technologies AG, et al.*, defendants are correct. The Cartwright Act expressly states that only the California Attorney General may bring suit on behalf of natural persons. Likewise, the Cartwright Act nowhere allows for non-California Attorneys General to bring a representative action on behalf of government entities. As such, plaintiff's claim on behalf of natural persons and entities under the Cartwright Act, is hereby DISMISSED.

F. Conclusion

For all the foregoing reasons, defendants' motion to dismiss plaintiff's complaint is GRANTED in part and DENIED in part, as follows:

1. With respect to plaintiff's claim brought pursuant to the Sherman Act, the court hereby DISMISSES all claims seeking recovery on behalf of indirect purchasers, to the extent such claims are pled in paragraphs 86 and 10 of the complaint.

All representative claims on behalf of unnamed government entities are also DISMISSED, although leave to amend these claims is granted, as stated herein.

2. With respect to plaintiff's claim pursuant to New York's Donnelly Act, plaintiff's claim on behalf of government entities is DISMISSED, with leave to amend as stated herein. Plaintiff's claim for monetary damages on behalf of natural persons is DISMISSED with prejudice. Defendants' motion to dismiss plaintiff's claim to the extent it seeks a civil penalty, however, is DENIED.

3. With respect to plaintiff's claim brought pursuant to Executive Law § 63(12), defendants' motion to dismiss the claim on timeliness grounds, and on grounds that the claim is barred due to procedural restrictions, is DENIED. Plaintiff's claim on behalf of government entities is DISMISSED with prejudice, as is plaintiff's request for recovery of treble damages.

4. With respect to plaintiff's claim on behalf of natural persons and government entities pursuant to the California Cartwright Act, it is DISMISSED with prejudice.

Leave to amend is permitted *only* as specified herein. Amendment as to additional matters is not permitted without prior leave of court. Any amended complaint shall be filed no later than **October 1, 2007.**

IT IS SO ORDERED.

N.D.Cal.,2007.
In re Dynamic Random Access Memory (Dram) Antitrust Litigation
Not Reported in F.Supp.2d, 2007 WL 2517851 (N.D.Cal.), 2007-2 Trade Cases P 75,873

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